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 Filed November 1, 1952, Harry M. Hull, Clerk

EXHIBIT A

OPINION OF THE LOYALTY REVIEW BOARD:

December 12, 1951

CHAIRMAN, LOYALTY REVIEW BOARD:

CASE OF: John Stewart Service, Foreign Relations Officer, U. S. Department of State, Washington, D. C.

The undersigned panel of the Loyalty Review Board first took up this case on post-audit, and on March 3, 1950, recommended that it be remanded to the Loyalty Security Board of the State Department for a hearing on charges. Subsequently a hearing was held, and the State Department board reaffirmed its decision favorable to the employee. Pending consideration of this decision on post-audit, supplementary information was received from the F.B.I. and the file was returned to the State Department board for such consideration as it deemed advisable. And after the amendment to Executive Order 9835 by Executive Order 10241 the case was again referred to the State Department board, which in each instance reaffirmed its favorable action. The case then came once more before this panel on post-audit, and after review of the entire file it was recommended under date of October 9, 1951, that a hearing be held pursuant to Loyalty Review Board Regulation 14.

A hearing was accordingly held by the undersigned panel at the office of the Loyalty Review Board, Washington, D. C., on November 8, 1951, at which the em-

ployee was present and testified and was represented by his counsel, Charles Edward Rhetts of Washington.

86 We are satisfied that during the employee's service in China, including his visits to Yenan while assigned to the Army and acting under Army orders, the reports which he made from Yenan raise no reasonable doubt concerning his loyalty. In this respect we reaffirm the opinion expressed in our memorandum of March 3, 1950, in which we said:

> "It is evident that as a result of his official visit to the Communist headquarters at Yenan and from other sources, Mr. Service believed that the Communists were putting up a more effective fight against the Japanese than the Nationalists, and that the Communists should be helped. This view was shared by other observers, and it appears to have been Service's honest opinion. That he held and reported such opinion is, in the judgment of this panel, no reflection upon his loyalty. Furthermore, it was a part of his duty to confer with the Communists and report upon what he found and his conclusions as to what should be done. It should also be noted that there are many reports from those familiar with Mr. Service's work which are highly commendatory."

Concerning the employee's conduct in other respects while on assignment in China, we have in the file no sufficient evidence to support a doubt on the question of loyalty. There is, however, testimony of Patrick J. Hurley before the Armed Services Committee of the United States Senate at hearings held in June 1951, indicating that the employee may have given a Chinese Communist official a copy of his report of October 10, 1944, to General Stilwell, entitled "The Need for Greater Realism in our Relations with Chiang Kai-shek." This is the report known as Service's Report No. 40. This testimony was not available to us at the time of our hearing, and the employee was not examined upon it. We therefore make no finding with respect

to this question but make note of it as a subject worthy of inquiry should there be further proceedings in
87 this case.

A review of the entire file, including the testimony at the hearing before the State Department board, also satisfies us that no reasonable doubt concerning the employee's loyalty arises from his activities while assigned to the staff of General MacArthur in Tokyo.

There is no evidence in the file that the employee was ever a member of the Communist Party or of any other organization on the Attorney General's list.

There remains for consideration the employee's dealings with Philip C. Jaffe of New York, the editor of Amerasia, and with others after his return from China on April 12, 1945, and up to the time of his arrest in connection with the Amerasia case on June 6, 1945. In this connection reference is made to the following provision of Executive Order 9835:

"Part V—Standards

"2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following. . . .

"d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States."

There is no evidence that the employee stole or abstracted from the official files and transmitted to Jaffe or any other person any official files. Such files found in Jaffe's possession appear to have come from Emmanuel S. Larsen, Andrew Roth, or some other source. It was on this charge that the Grand Jury in the so-called Amerasia

case found no bill against Service. It is not disputed, however, that Service did intentionally lend for a period of time to Jaffe from 8 to 19 copies which he had
88 retained in his files of his reports made during his official visits to the Communist headquarters in Yenan during 1944 and 1945, and that he orally gave Jaffe considerable information concerning what he had learned while on Government service in China and that these reports and some of this information was of a confidential or non-public character. The practice of giving out information appears to have been somewhat loose, but it is clear there was, at least to some extent, a breach of State Department regulations. The only question remaining is whether these disclosures were of such a character or were made under such circumstances as to lead to the conclusion that there is reasonable doubt concerning the employee's loyalty to the Government of the United States. We shall now address ourselves to that question.

The employee left Yenan on April 8 and arrived in Washington from China on April 12, 1945, bringing with him his file copies of his Yenan reports for 1944 and 1945 and also originals for the State Department of some of his 1945 reports. The others had been distributed by him through channels while in China. These State Department copies he says he delivered at the State Department shortly after his arrival, and there is no evidence to controvert this. He appears to have spent the first week after his arrival in Washington reporting to various officials in line of his duty.

On April 19, a week after his arrival from China, Service received a telephone call from Lieutenant Andrew Roth of the Navy Department, whom he had met in 1944 at a meeting of the Institute of Pacific Relations, inviting him to dinner. Later, Roth called and said that he had also invited Philip Jaffe, who was staying at the Statler in Washington, and suggested that Service call and pick Jaffe

up. Service accordingly called up Jaffe and arranged to meet him at Jaffe's room in the hotel. Service testified that he had never before met Jaffe, but knew of
89 him as editor of Amerasia, and, believing that he would be interested, brought with him to Jaffe's room his file copy of a report of an interview he had had in Yenan in the spring of 1945 with Mao Tse-tung, the Communist leader. There is information in the file indicating that Service had met Jaffe in China some years previously, and had transmitted information to Jaffe from China. We find no corroboration of this. And it appears from F.B.I. reports that Service and Jaffe in their telephone conversion arranged to meet in Jaffe's room because if they were to meet in the lobby they might not recognize each other.

Service allowed Jaffe to retain the copy of the Mao interview, and Jaffe expressed an interest in Service's other reports and it was arranged that they would meet again in Jaffe's room at the Statler on the morning of the 20th. Pursuant to this appointment Service the next morning brought a number of his reports (which in his testimony before the State Department board he claimed were specially selected as being of such nature that they might be divulged) and left them with Jaffe. Service then returned for lunch with Jaffe and Lieutenant Roth in Jaffe's room at the hotel, and Jaffe said that he wanted more time to read the reports and would like to take them to New York, to which Service assented. Service testified that he lent Jaffe 8 or 10 of his reports. The information in the file indicates that Jaffe may have received from Service as many as 19.

On April 25 Service called on Jaffe at the Amerasia office in New York, and picked up the reports. As he kept no record of what reports he had lent to Jaffe and made no check of those which were returned, we have no accurate information as to how many and what reports

Service in fact lent to Jaffe. While in New York on the 24th and 25th of April, Service stayed at the apartment of Mark Gayn, a free lance writer on Far
90 Eastern subjects whom he had met for the first time on April 18th and who had been a college mate of his brother, and on the evening of the 24th he attended a party at Gayn's apartment at which Mr. and Mrs. Jaffe, Kate Mitchell, and others were present. Service met Jaffe again in Washington at Jaffe's room in the Statler on May 8, and on May 29 picked up Jaffe at the Statler and attended with him and others a farewell party for Lieutenant Roth. He also met Jaffe in New York on a week-end party of Mr. and Mrs. T. A. Bisson on May 19 and 20. There is no evidence that Service passed any copies of reports to Jaffe at any meetings subsequent to those of April 19 and 20, but there is information in the file indicating that on May 8 and 29 at Jaffe's room in the Statler Service continued to talk freely with Jaffe, as he had on the 19th and 20th of April, and this notwithstanding the fact that at these first meetings Service felt that Jaffe was unpleasantly inquisitive and insistent, and that after leaving the meeting of April 20 with Lieutenant Roth Service asked Roth if Jaffe was a Communist, to which Roth replied that he did not think he was a Communist, but that he was extremely sympathetic. It was also notwithstanding the fact that on April 25th in New York one Harold Isaacs, known to Service to be a former Communist, in response to an inquiry made by Service told Service that Jaffe was "bad business" or "bad medicine", and that while on the week-end party with the Bissons on May 19th and 20th Jaffe in conversation with Service took what appeared to Service to be the "party line" by telling Service that "they had real freedom of the press in Russia, that they did not have real freedom of the press here."

Service concedes that he should not have lent copies

of his reports to Jaffe, but in extenuation he says that so far as he then knew Jaffe was a reputable journalist, and that giving what he called "background" information
91 to reputable journalists had been encouraged by his superiors. The testimony of others indicates, however, that background briefing seldom went to the extent of showing reports, much less lending them or giving them out. And Brooks Atkinson, in a letter submitted to the State Department board on behalf of Service, says, "My only complaint as a reporter was that Mr. Service was too punctilious about State Department security and declined to tell me everything he knew. He never permitted me to see classified material and was cautious and guarded about matters he considered confidential." This contrasts strangely with the very different treatment accorded by Service to Jaffe. Indeed, Service frankly stated that he placed no restriction on the use which Jaffe might make of the reports which he lent to him.

Service conceded that in no event should reports which had passed through headquarters and to which were attached letters of transmittal or comments be handed out. A number of such reports were found among Jaffe's papers, but the evidence indicates that none of them came from Service.

Copies of reports which Service did lend or may have lent Jaffe were also found among Jaffe's papers. It appears that one Anne H. C. Blumenthal copied a number of reports for Jaffe, and it seems probable that some or all of those lent by Service to Jaffe were among these.

We have examined the 18 reports copies of which Service concedes were or may have been lent by him to Jaffe. Some of these are not classified; others are classified "secret" or "confidential." Service testified, and the evidence indicates, that these were his own classifications and that, in many cases at least, before he showed them to

Jaffe by reason of lapse of time or otherwise they were no longer secret or confidential.

92 From our examination of these reports, it appears to us that they were for the most part such as a newspaper reporter on the spot might transmit to his newspaper. Some of them, however, appear to us to be of a nature which no discreet person would disseminate without express authority, and some of them were dated within four to six weeks of the time they were lent to Jaffe, and the originals had not been in the hands of the State Department for more than a week. These recent reports therefore might be considered as "hot news."

We have no knowledge of what information Service may have imparted to Jaffe and others orally during these meetings in New York, or during the evening parties he went to with Jaffe and others in Washington on April 19 and May 29. We do, however, have some information concerning Service's conversations with Jaffe in Jaffe's room at the Statler in Washington on April 19th and 20th and May 8th and 29th. These indicate that there was some conviviality, and that Service talked very freely, discussing, among other things, troop dispositions and military plans which he said he had seen and which he said were "very secret." This intimacy of talk appears to have continued unabated, though from the first Service felt that Jaffe was unduly inquisitive and evidently suspected that Jaffe might be a Communist, having after the meeting of April 20th asked Lieutenant Roth whether Jaffe was a Communist, to which Roth replied that he did not believe Jaffe was a Communist but that he was extremely sympathetic. It also continued after Isaacs had told Service on April 25th that Jaffe was "bad business" or "bad medicine," and after Jaffe had on May 19th or 20th taken the "party line" in conversation with Service. At no time did Service consult his superiors as to the extent to which he might properly give Jaffe information.

93 What have we that gives ground for reasonable doubt as to Service's loyalty? With some necessary repetition of what has preceded, the grounds, as we see them, are these:

He knew very early in his association with Jaffe that Jaffe was a very doubtful character, extremely left-wing, as Service said in his testimony before us. He was asked before us, "What made you think he might be a Communist?" The answer was, "I don't remember anything specific. It was fairly obvious from talking to him, and his general approach, that he was extremely left-wing. He was a much more uncritical booster of the Chinese Communists than I was. At some point fairly early, he mentioned his interest and participation in something like Russian Relief."

His counsel urged in his excellent brief that Service had mentioned Jaffe to several of his friends and colleagues, and that none of the persons of whom these inquiries were made—Vincent, Friedman, Isaacs, or Salisbury—gave any indication that Jaffe was a Communist or an improper person to associate with. His statement is not entirely accurate, but it scarcely helps Service.

Service was a highly trusted official of his Department, of long and wide experience in his particular field. The statements made by him, quoted above, show that no such warning was necessary. He knew almost from the start of his relations with Jaffe of Jaffe's true character. To this man he gave, as we have stated, a large number of his reports. His story is that there were eight or ten of them which he gave to Jaffe. Jaffe, as reported by the F.B.I., said Service gave him 19. Giving these reports was against the State Department's regulations, as Service knew. It is true that, as we have said, these regulations were apparently not always strictly observed, and how many of these reports Service really furnished Jaffe is a matter of considerable doubt.

94 Step by step, as Service continued in his association with Jaffe, Service had a continuing line of warnings as to Jaffe's character. We begin on April 20, after Service had delivered his reports to Jaffe. He asked Roth if Jaffe were a Communist, and Roth said he was not a Communist, but a left-winger and very sympathetic. Later, when Service came to New York on April 24 and 25, two things which should have been a warning occurred.

He said he was very much annoyed at finding that Jaffe had turned over Service's reports to Gayn for use. It had been previously noted that Service had put no restrictions on the use to which Jaffe might put these reports. He had, he says, simply assumed that Jaffe would treat them as reporters might use them for background information.

In New York, he saw his friend, Isaacs, who said Jaffe was "bad medicine." Isaacs had been a Communist himself, and "bad medicine," used by an ex-Communist, should, we think, have had some special significance to Service. Later, at Bisson's party on May 19, Jaffe, as quoted above, takes what Service himself called "the Communist line" in saying that there was more freedom of the press in Russia than in this country.

Service also says that he soon disliked Jaffe as a person—that he was aggressive and nosey. Yet, notwithstanding what Service knew about Jaffe as a communist sympathizer, and notwithstanding this stated dislike of him as a person, we find in the conversations between Jaffe and Service at the former's hotel room in the Statler, as reported by the F.B.I., no indication of any caution by Service in the continuous line of answers he made to Jaffe's "nosey" inquiries on State Department matters. If Jaffe was nosey, he rarely failed to get from Service what he asked for, punctuated at one time, at least, by the statement, "This is very secret." Service undertook to

get documents for Jaffe in the Department. Quite irrespective of whether these documents could properly be made available to Jaffe, the question we ask ourselves is, "Why should Service do it for a man he says he disliked and whom he knew to be very much of a left-winger and, as Service's own statements indicate, whom he suspected of being a Communist?" The evidence of Jaffe's true character was, we think built up with every contact Service had with him, and yet his last long conversation with Jaffe on May 29 shows Service telling Jaffe matters which we think a reasonably decent person in Service's position of trust should have hesitated to disclose even to a friend in whose character he had complete faith. The contrast between his treatment of Jaffe and his treatment of Brooks Atkinson, an accredited representative of the New York Times, as reported by the latter and previously quoted herein, requires no comment.

To say that his course of conduct does not raise a reasonable doubt as to Service's own loyalty would, we are forced to think, stretch the mantle of charity much too far.

We are not required to find Service guilty of disloyalty, and we do not do so, but for an experienced and trusted representative of our State Department to so far forget his duty to his trust as his conduct with Jaffe so clearly indicates, forces us with great regret to conclude that there is reasonable doubt as to his loyalty. The favorable finding of the Loyalty Security Board of the Department of State is accordingly reversed.

* * * *

96 Filed November 1, 1952

EXHIBIT B

OPINION OF THE LOYALTY SECURITY BOARD OF THE DEPARTMENT OF STATE

October 6, 1950

The case of John Stewart Service, on which the Loyalty Security Board of the Department of State had reported a favorable determination based on the information then available, was remanded on March 14, 1950, by the Loyalty Review Board, with the statement that the reviewing panel had concluded that the record had not been fully developed, and that a hearing should be held on charges. In accordance with this recommendation charges were preferred against Mr. Service and a hearing has been held. The hearing before the Loyalty Security Board has consumed fifteen days and has resulted in the accumulation of a voluminous transcript and numerous exhibits. Although the Regulations prescribed by the Loyalty Review Board provide that the determinations of the Loyalty Security Board "shall state merely the action taken", it is the feeling of the Loyalty Security Board that a full statement should be made of the reasons for its conclusions in this case, in view of the wide interest in the "Amerasia" case, in connection with which Mr. Service was arrested in 1945.

John S. Service was born in Chengtu, China, August 3, 1909, of American missionary parents. He was educated at Shankhai American School, Berkeley High School (Berkeley, California) and Oberlin College, A.B. 1931. At Oberlin he was captain of two athletic teams and president of the Men's Honor Court. In 1933 he returned to China and became clerk in the American Consulate at Kunming in the Province of Yunnan. In 1935 he was admitted to the

Foreign Service and was assigned as a language student at the Embassy in Peiping; in 1938 he was transferred to the Consulate at Shanghai; in 1941 he was assigned
97 as Third Secretary of the Embassy at Chunking.

After a four-months' leave in the United States in 1942-43, he was sent to Lanchow, in May 1943, as an observer for the Embassy. In August 1943, at the request of Secretary of War Stimson, he was detached from the Embassy and assigned to General Stilwell, Commander of the American forces in the China-Burma-India Theater. During this service he was sent with an Army observer group to the Communist headquarters in Yenan. He was in Yenan from July to October of that year, and was then returned to the United States, at the time of General Stilwell's recall. After a brief period of consultation in Washington he went on leave. In January 1945, he was again ordered to Chunking, for detail to the staff of General Wedemeyer, who succeeded General Stilwell. On March 9 he was again sent to Yenan under Army orders to report on an expected Communist Party Congress, but on March 30 was suddenly ordered to return to the United States, where he arrived on April 12. He was arrested on June 6, in connection with the so-called "Amerasia" affair, but on August 10 the Grand Jury returned "no true bill" against him. In September, 1945, he was assigned to the staff of the United States Political Adviser in Tokyo, where he served until he was hospitalized, from April to August, 1946. After a leave in the United States he served as First Secretary and Consul at Wellington, New Zealand, from October 1946 to January 1949; for about two months in 1949 he served on the Foreign Service Selection Board in Washington; and for about a year as Special Assistant to the Chief, Foreign Service Personnel. He was en route to an assignment as Consul General at Calcutta when recalled for the present hearing.

Charges Based on Reports from China

The Board considered first the charges against Mr. Service which have to do with his conduct in China, in
98 particular from 1943 to 1945, while he was stationed in Chunking, Lanchow and Yenan.

First, it is alleged that Mr. Service was disloyal or insubordinate to General Hurley who was in China from August to November 1944 as personal representative of the President, and served as Ambassador to China from November 1944 until November 1945. In particular it is charged that Mr. Service's second trip to the Communist area in Yenan was in disobedience to Ambassador Hurley's instructions. His sudden recall to the United States in March, 1945, was at the instance of Ambassador Hurley, who was in the United States at the time on consultation. The Board finds that at no time during General Hurley's service in China, either as the President's personal representative or as Ambassador, was Mr. Service attached to the Embassy, or subject to Ambassador Hurley's direction. In August, 1943, Mr. Service had been detailed to General Stilwell, and in July, 1944, sent by General Stilwell with an Army observer mission to the Communist Headquarters in Yenan. He was still in Yenan when General Hurley arrived in Chunking in August, and returned from Yenan to the United States at the time of General Stilwell's recall in October. On Mr. Service's return to China in January, 1945, he was still assigned to the Army, now under General Wedemeyer. As for his second trip to Yenan in March, General Gross, who was in command during General Wedemeyer's absence in Washington with Ambassador Hurley, accepted full responsibility, and stated that the trip had the concurrence of both Army Headquarters and the Embassy. Mr. Service cannot have been guilty of insubordination to Ambassador Hurley, for he was at no time his subordinate; he acted at all times strictly in accord-

ance with the orders of his proper commanding officers, to whom his services were apparently satisfactory.

99 *Second,* it is charged that Mr. Service was disloyal to American policy with respect to China, as that policy was represented by Ambassador Hurley, in that Mr. Service was critical of the Chinese Nationalist Government of Chiang Kai-shek and favorably disposed towards the Chinese Communists; that he favored arming and collaborating with the Communist forces; and that he favored stopping United States assistance to Chiang Kai-shek and extending it to the Communists, and believed that Communist participation in Government was the only hope for a stable democratic and independent Chinese Government.

Third, it is charged that Mr. Service was sympathetic with communism and working in the interest of the Communist Party. Since both the *second* and the *third* charges were based upon the reports and recommendations submitted by Mr. Service from China, and since the two charges are closely related in substance the Board considered them together.

There was nothing covert or furtive or secret, so far as American authorities in China or elsewhere were concerned, about Mr. Service's observations, conclusions and recommendations with regard to Chinese affairs from 1942 to 1945. The Board has had access to 127 reports written by Mr. Service between those dates. Only 4 of these precede his assignment as a political observer; about 10 are from Lanchow, where he was observer for the Embassy; about 50 were made at Chunking after he was detailed to the Army; about 35 were made during his first tour of duty in Yenan, where his function was to secure political intelligence for the Army, and for this purpose to become acquainted with the principal Communist leaders, and to report on the organization, policies, program, propaganda and popular support of the Communist Party; 3 were made in Washington; 11 on his return to Chunking; and 14 on

his second trip to Yenan under General Gross's orders. Mr. Service's reports while he was on detail with the Army were in the form of memoranda, prepared in quadruplicate—the original for Army Headquarters, one copy for his immediate superior, Mr. John P. Davies, one for the Embassy, and one for his own files. Mr. Service's views were, therefore, well known throughout both Army Headquarters and the Embassy in China, and in the War and State Departments in Washington, to which Departments copies were forwarded by the Army Headquarters and Embassy respectively.

It is necessary to assess these reports against the background of 1944-1945 rather than that of 1950. In 1944-1945 the war with Japan was reaching its climax. It was the duty of the United States Military Commander in the China Theater to do all in his power to contribute to the defeat of Japan, and to this end to bring about the maximum possible Chinese military effort. In 1944-1945 we were allies with the Soviet Union in the war in Europe, and were furnishing lend-lease arms to the Russian Communists on a large scale. In 1945 it was Ambassador Hurley's mission in China, not only to prevent the collapse of the Chinese Nationalist Government and to keep the Chinese Nationalist Armies in the field, but also to prevent civil war in China and to unify the Anti-Japanese forces in China, whether Nationalist or Communist. This double-headed objective could only be accomplished by an accommodation between the Chinese Nationalist Government and the Chinese Communists. It was precisely such an accommodation which General Hurley was endeavoring, under instructions, to bring about.

The Board has examined Mr. Service's reports in the light of this background. It finds them objective, and extraordinarily accurate as political forecasts of what was to come. It finds no indications that they misstated any fact or reported anything other than his best judgment

101 candidly stated. The sum and substance of Mr. Service's recommendations was contained in his report No. 40, dated October 10, 1944, which profoundly displeased Ambassador Hurley, and in a report drafted by him and by R. P. Ludden, another American observer, dated February 14, 1945. Copies of both reports which have been declassified are appended to this opinion.[1] The essential difference between Ambassador Hurley on the one hand and Mr. Service, General Stilwell and the staff of the Embassy at Chungking on the other hand, concerned the terms on which the amalgamation of forces was to be effected, the conditions under which lend-lease aid would be extended to the Communist forces; the extent to which United States interests required acceptance of the views of Chiang Kai-shek as to the nature and policies of the Chinese Government, or change in the nature and policies of that Government.

Both Ambassador Hurley and Mr. Service advocated, and it was a major objective of Ambassador Hurley's mission to achieve, unification of all Chinese military forces for the purpose of defeating Japan. Ambassador Hurley considered that his primary duty was to sustain the Nationalist Government and that the Communists should be armed only through the Nationalist Government. Mr. Service and General Stilwell considered the Nationalist Government was not prosecuting the war as vigorously as required. They believed that the Chinese forces could be unified only by utilizing lend-lease aid as a bargaining weapon to force Chiang Kai-shek to form a coalition government, and that some lend-lease aid might, if re-

102 quired, be extended to the Chinese Communist forces

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[1] These reports were not in fact appended in the opinion of the Loyalty Security Board as released to the press by the Department of State on December 13, 1951. The document referred to as report No. 40, however, is printed in the Appendix to the Tydings Hearings, at pages 1987-1990. The Service-Ludden memorandum of February 14, 1945 is printed in the same Appendix at pages 1980-1981.

directly. Mr. Service did not favor stopping lend-lease assistance to Chiang Kai-shek but did favor making its continuance conditional upon agreement by Chiang to broaden the base of the government and undertake substantial economic, political and social reform.

The issue before the Board does not require a decision as to who was right. The issue is rather whether the views expressed by Mr. Service constitute disloyalty to American policy with respect to China. The Board finds no indication that Mr. Service was disloyal in this respect. Rather, the Board finds that he was properly stating to his superiors the conclusions at which he had honestly arrived as a result of his personal observations both in Chungking and in Yenan, and recommending a change in policy which he believed essential in the national interest.

In this connection the Board finds itself in hearty accord with a statement made by Secretary Byrnes to the Foreign Relations Committee concerning the reports of Mr. Service and of the other Foreign Service officers criticized by Ambassador Hurley: "What it amounts to is that within proper channels they expressed to those under whom they served certain views which differed to a greater or less degree from the policies of the Government as then defined. Of course, it is the duty of every officer of the United States to abide by and administer the declared policy of his Government. But conditions change, and often change quickly in the affairs of Governments. Whenever an official honestly believes that changed conditions require it, he should not hesitate to express his views to his superior officers. I should be profoundly unhappy to learn that an officer of the Department of State, within or without the Foreign Service, might feel bound to refrain from submitting through channels an honest report or recom-
103 mendation for fear of offending some one in the Department." As Mr. George F. Kennan, Counselor of the Department, said before this Board: "I would feel

very alarmed for the future of Foreign Service reporting if we ever were to permit the implication to creep in that a policy recommendation contrary to the policy that was actually adopted by the Government was a sign of disloyalty to the Government purposes."

With respect to the *third* allegation that Mr. Service was sympathetic with Communism and working in the interest of the Communist Party, the Board finds no evidence that his reports acquired their character from any ulterior motive or association or from any impulse other than his desire to acquaint his superior officers with the facts as he saw and interpreted them. As early as January, 1943, he reported that civil war in China would bring about a Communist government which would not be democratic in the American sense, and which would be more inclined to friendship with Russia than with the United States. In April, 1944, he recommended that in order to prevent Russian dominance over a part or all of China, the United States Government should show a sympathetic interest in the Communist and liberal groups in China, and use its influence with the Kuomintang to promote Chinese unity on the foundations of progressive reform. In June, 1944, he analyzed the weaknesses of the Kuomintang which he said were precipitating a debacle of which the only parties to benefit would be Japan immediately and Russia eventually. He recommended, not a flat refusal to aid the Kuomintang, but the use of that aid as leverage to induce the Kuomintang to broaden the base of the Government and to undertake political reform. When he got to Yenan he reported that the Japanese there were being faced by a total mobilization based on an economic, political and social revolution, and that unless the Kuomintang went as far as the Com-
104 munists in political and economic reform, the Communists would become the dominant force in China within a few years. The Board finds nowhere in his reports any sympathy for Russian or for world Communism, but

only a clearly expressed fear that the policy of the Chinese Nationalist Government, and of the United States Government as a supporter of Chiang Kai-shek alone, was headed for a major disaster that would throw all of China into the hands of the Soviet Union.

The Board had the benefit of expert testimony from Mr. George F. Kennan, Counselor of the Department and for many years a leading American authority on the Soviet Union and Communist matters. At the request of the Board, Mr. Keenan examined 127 of Mr. Service's reports for the specific purpose of forming an opinion as to whether or not they reflected Communist or pro-Communist tendencies or propaganda themes. After completing his examination, Mr. Keenan testified that Mr. Service's reports indicated no Communist inspiration or guidance, that they were free from the exaggerations and distortions characteristic of Communist propaganda, that in important instances the reports took issue with the Communist Party line, that some of Mr. Service's early reports indicated a certain naivete with respect to the Soviet Union but that this was substantially corrected in his later reports, that Mr. Service appeared to be reporting honestly and conscientiously the views at which he had arrived on the basis of an open-minded examination and analysis of the facts before him. Mr. Kennan concluded that the reports could not have been the work of a man with a closed mind or ideological preconceptions.

The Board finds that, on the basis of his reports from China, Mr. Service was neither a Communist nor pro-Communist.

Fourth, it has been charged that at least one of Mr.
105 Service's reports was circulated among the Chinese Communists, and that the Communists were advised that Ambassador Hurley's efforts to prevent the collapse of the Nationalist Government did not represent United States

policy. The charge was denied by Mr. Service and is entirely out of character with his function. His reports did not purport to state United States policy, but only his personal observations, conclusions, and recommendations. No evidence was presented to support this charge and the Board finds no basis for it.

The "Amerasia" Affair.

In the so-called "Amerasia" affair, Mr. Service was charged with furnishing classified information to one Philip Jaffe. In 1945 Philip Jacob Jaffe of New York City was co-editor with Kate L. Mitchell of a magazine called "Amerasia." Jaffe was born in Russia, came to the United States in 1905 and was naturalized in 1923. He was a member of the editorial board of "China Today", the official publication of the American Friends of the Chinese People, which had been cited as a Communist front by the House Committee on Un-American Activities. He is also reliably reported to have collaborated with other Communist front publications, to have been National Treasurer of the National Council of American Soviet Friendship, Inc., an organization on the Attorney General's list, and to have been in frequent contact with many prominent members of the Communist Party. On March 10, 1945, a month before Mr. Service's arrival in the United States, OSS agents searched the offices of "Amerasia", and there discovered a large number of classified government documents principally of State and Navy Department origin. Upon being advised by the OSS of this discovery the State and Navy Departments jointly requested the FBI to make a full investigation. On June 6, Mr. Jaffe was arrested by
106 the FBI, along with Kate Mitchell, and four others, Emmanuel Sigurd Larsen, Lieutenant Andrew Roth, Mark Gayn and Mr. Service. Mr. Larsen was a State Department employee, Lieutenant Roth was a naval reserve

officer on duty in the Office of Naval Intelligence, and Mark Gayn was a free-lance writer interested in questions concerning the Far East. Subsequently a Grand Jury returned indictments against Jaffe, Larsen and Roth, but found "no true bill" against Mitchell, Gayn and Service. Jaffe pleaded guilty, and was fined $2500. Larsen, who had admitted procuring some of the documents for Jaffe, also pleaded guilty and was fined $500. The case against Roth was nol-prossed.

Among the large number of government documents found in Mr. Jaffe's office were copies of about 40 of Mr. Service's reports, and the primary question before this Board in connection with this aspect of the Service Case is his part in making any of these available to Mr. Jaffe. Eight of these 40 were ozalid copies from State Department files which were found in Mr. Jaffe's brief case and were identified by Mr. Larsen as papers which he procured for Mr. Jaffe. Included in the 40 were also typed or carbon copies of at least 10 Service reports procured from other sources than the State Department. None of these 40 reports were papers from Mr. Service's files.

It will be recalled that Mr. Service customarily kept a carbon copy for his personal files of the reports which he made while detailed to the Army in China. Most of these copies bore the typed classification "Secret" or "Confidential" which Mr. Service himself had placed on the original. Copies of about 70 of these reports were in Mr. Service's possession when he arrived in Washington on April 12, 1945, and were found in his possession at the time of his arrest. As stated above, none of Mr. Service's personal copies were found in Jaffe's possession.

107 Mr. Service made a full statement of his connection with Mr. Jaffe to the FBI, to the Grand Jury, and to the Board. Although he had heard of Mr. Jaffe as editor of "Amerasia" he had never met him or communicated with him prior to his return to Washington on April 12,

1945. On April 19 Mr. Service was introduced to Jaffe by Lieutenant Roth, whom he had met the preceding November at a talk that he (Service) gave to the Institute of Pacific Relations, and who now invited him to dinner. Thinking that Jaffe as editor of a specialist magazine on the Far East would be interested in a conversation he had had with the Communist leader Mao Tse-Tung in Yenan, Service took along with him to his meeting with Jaffe a copy of his report on that subject. Mr. Jaffe was interested and asked if Service had other reports that he could see. He invited Mr. Service to lunch the next day, and Mr. Service brought to that meeting about 8 or 10 copies of reports which he carefully selected from his personal file as being descriptive and not discussing American policy. Mr. Jaffe at lunch stated that he wished to take the papers to New York with him. Mr. Service permitted Mr. Jaffe to do so, and afterwards, on April 25, picked up the reports in New York. This, according to Mr. Service, and so far as the evidence before the Board goes, was the entire extent of Mr. Service's transmission of classified documents to Mr. Jaffe. The exact number of documents loaned to Mr. Jaffe is uncertain. It is established that Mr. Jaffe had other sources from which he obtained copies of Mr. Service's reports. The Board found no evidence to disprove Mr. Service's recollection that the number of reports which he loaned to Mr. Jaffe did not exceed ten.

The transmission of classified documents to a person outside the Government service, whether for examination or loan, was not only highly injudicious on Mr. Service's part, but was a violation of the security regulations and
108 practices of the Department. Since the issues here are (1) loyalty, and (2) security risk, the Board has had to examine into the motives behind his act. In this connection the nature of Mr. Service's function in China, from which he was freshly arrived, becomes of moment.

One of Mr. Service's official duties under General Stilwell had been to serve as public relations officer for Army Headquarters, and as such to work closely with American correspondents and to furnish them "background information" regarding the political situation in China. Understanding of this situation was essential to intelligent and accurate press reporting. "Background information" was understood at Army Headquarters to include, at the discretion of the officer, classified information, which could not itself be published, but which would enable correspondents correctly to interpret and report events as they occurred. On his return to the United States in October 1944, as the first American official to return after a visit to the Communist-held areas in China, Mr. Service was sought after, not only by government agencies whose work related to China, but also by newspaper people and other writers on Far Eastern affairs. He was invited, and with the authorization of his superiors accepted the invitation, to address an "off-the-record" meeting of the Institute of Pacific Relations. For all of these conferences he used as working material the substance of his observations in China, the very matter which was contained in his classified reports. It is apparent to the Board that Mr. Service, without inquiring into Mr. Jaffe's background or credentials, but solely on the basis of Mr. Jaffe's connection with "Amerasia", assumed to treat Mr. Jaffe as a reputable writer, and to give him the same sort of "background information" that he had been accustomed to give to newspaper men in China. It is also apparent that Mr. Service was eager to impart to persons interested in the Far East, his views of the Chinese situation.

109 Mr. Service clearly committed two serious indiscretions with reference to these reports. The first was to communicate any classified information at all to Mr. Jaffe without checking on his reputation. The second,

which was both an indiscretion and a breach of regulations, was to allow Mr. Jaffe to take possession, for however short a time, of classified documents. The Board takes note, however, of the fact that the documents in question contained nothing that could be considered harmful to the national security; they were reports of Mr. Service's personal observations on the aims and situation of the Chinese Communists. The Board cannot find Mr. Service disloyal to the United States on the basis of his loan of these documents to Mr. Jaffe.

The Board had before it certain confidential information from the F.B.I. regarding conversations between Mr. Jaffe and Mr. Service in which Mr. Service referred to certain military plans in China as "very secret", and to certain information about the whereabouts of General Stilwell as "very confidential". It has been charged that Mr. Service in these conversations disclosed classified information to Mr. Jaffe. It appeared on hearing that Mr. Service on his return to the United States in April, 1945, was not in possession, nor advised of the contents of, any classified documents regarding military plans or the whereabouts of General Stilwell. As a matter of fact he was not advised of any secret information at all concerning the military plans of the United States or of General Stilwell. He was aware only of general discussions and speculations regarding the possibility of a landing in China, and of the desirability of cooperating with whatever Chinese forces might be met there. General Stilwell had told him that he was looking for a "fighting job" in the Pacific. He did not know the determination of any of these issues. He could therefore not have been guilty of disclosing secret information as alleged, for he had none. It
110 is to be noted that oral information of the sort mentioned does not, like a document, bear on its face its classification, and that it is a mark of prudence, rather than the opposite, for a government official in the

discussion of military speculations with the press in war time, to refer to the subject matter as secret or confidential, in order that no conclusions may be attributed by the press to government sources. The Board does not find any indiscretions on the part of Mr. Service in this issue.

So far as security risk is concerned, the record contains no evidence that Mr. Service has ever, subsequent to the Jaffe incident, been guilty of any indiscretion. The Board believes that the experience Mr. Service has been through as a result of his indiscretion in 1945 has served to make him far more than normally security conscious.

The several social affairs to which Mr. Service was invited between April 19 and May 29, 1945—lunch with Gayn, dinner with Lt. Roth, lunch with Mr. Jaffe, an evening party at Mr. Gayn's, a party at Kate Mitchell's, and another at a Miss Yardouman's given for Lt. Roth, appear to have been initiated by those persons and to have been innocently accepted by Mr. Service as normal amenities. Mr. Service spent two nights at the apartment in New York of Mark Gayn, the free-lance writer, who shared with Mr. Service a China background and had been a college mate of Mr. Service's brother. The association with Lieutenant Roth, a naval officer in uniform on duty with Naval Intelligence, does not appear subject to criticism; the association with Mark Gayn appears to have been a natural one of mutual interests; the Jaffe and Mitchell invitations were accepted on the assumption that these were reputable literary people interested in China. All of these associations on the part of Mr. Service terminated on June 6, 1945. The Board does not consider them evidence of disloyalty, or to be of present significance as to security risk.

111 Mr. Service's name has also been connected with that of Mr. Owen Lattimore. Mr. Service had known Mr. Lattimore since they were both in Peiping in 1936.

After Mr. Service's return to the United States in 1945 he had several casual contacts with either Mr. or Mrs. Lattimore, and was finally invited to spend the first week-end in June at their home in Baltimore. Without his knowing it in advance, Lieutenant Roth and Rose Yardouman had also been invited, and Mrs. Lattimore suggested they come down together. Mr. Service took no documents with him on that occasion, but did take with him a personal copy of a new edition of the writings of Mao Tze Tung which Mr. Lattimore had asked to see. The Board finds nothing exceptional in this association of Mr. Service with a noted writer on Chinese affairs. Mr. Service was never a pupil or protege of Mr. Lattimore.

Subsequent Career

The third and final aspect of this case has to do with Mr. Service's tour of duty in Tokyo from September 1945 to his hospitalization there in April, 1946. It has been alleged that during that period Mr. Service was in touch with Japanese Communist leaders, and was in sympathy with Communism. It appears that Mr. Service served as administrative and executive officer in Tokyo, had no political functions, and took no part in policy decisions. The political reporting at SCAP Headquarters was done by Mr. John K. Emmerson, one of whose duties was to keep in touch with Japanese political leaders. Nosaka, one of the leaders of the Japanese Communist Party, who had spent most of the war at Yenan with the Chinese Communists, called on Mr. Emmerson at SCAP Headquarters and, having met Mr. Service in Yenan, inquired for him. Mr. Emmerson called in Mr. Service for a brief conversation. Mr. Service saw Nosaka on one or perhaps two other occasions, but at no time had any political conversa-
112 tions with him. No evidence was presented to the effect that he was ever in touch with any other

Japanese Communists. The Board finds no evidence that Mr. Service was sympathetic with Communism.

Conclusion

The Loyalty Security Board has given extended, careful and earnest attention to this case, and concludes, on the basis of all the evidence, that reasonable grounds do not exist for belief that John Stewart Service is disloyal to the Government of the United States. The Board further concludes that, notwithstanding a single serious indiscretion in the handling of classified information, he does not constitute a security risk to the Department of State.

On July 31, 1951 the Loyalty Security Board reconsidered the case of John Stewart Service under the provisions of the loyalty standard as amended by Executive Order 10241 of April 28, 1951 and determined that no reasonable doubt exists as to his loyalty to the United States Government.

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364 Filed November 1, 1952

EXHIBIT C

DEPARTMENT OF STATE
WASHINGTON

March 24, 1950

CONFIDENTIAL

My dear Mr. Service:

Under date of March 21, 1947, the President issued Executive Order 9835 prescribing procedures for the administration of an Employee Loyalty Program in the Executive Branch of the Government. Under date of March 11, 1949, the Department of State promulgated regulations

and procedures, a copy of which is attached, setting forth the revised loyalty and security principles and procedures relating to employees of the Department of State.

In the course of investigations conducted pursuant to this loyalty and security program certain information has been received by the Department of State which, after initial consideration by the Loyalty Security Board of the Department of State, necessitates the formulation of a charge against you.

The specific charges are that within the meaning of Section 392.2.f of Regulations and Procedures of the Department of State, you are a member of, or in sympathetic association with, the Communist Party which has been designated by the Attorney General as an organization which seeks to alter the form of government of the United States by unconstitutional means; and further that within the meaning of Section 393.1.d of said Regulations and Procedures you are a person who has habitual or close association with persons known or believed to be in the category set forth in Section 393.1.a of said Regulations and Procedures to an extent which would justify the conclusion that you might through such association, voluntarily or involuntarily, divulge classified information without authority.

Mr. John Stewart Service,
Department of State,
Washington, D. C.

A hearing has been scheduled under Section 395 of the Regulations and Procedures of the Department of State in order to consider this charge, with a view to making a recommendation to the Secretary of State whether or not, under the provisions of the Department of State
365 Appropriation Act, 1950, Section 104, Public Law 179, 81st Congress, First Session, your employment in

the Department should be terminated in the interest of the United States.

You are hereby notified and afforded an opportunity of appearing at such a hearing to be held by the Loyalty Security Board at 10:00 A.M. on April 20, 1950, in Room 2254, New State Department Building, Washington, D. C. You will be in regular duty and pay status pending the outcome of this hearing.

You are also informed that it is your privilege to reply to these charges in writing before the date set for your hearing or to appear before the Loyalty Security Board at this hearing, to be accompanied, if you so desire, by counsel or representative of your own choosing, and to present evidence in your own behalf, through witness or by affidavit.

In the event you desire further details in order adequately to prepare your answer to this charge, the undersigned is available to discuss the matter with you and your representative.

Sincerely yours,
For the Secretary of State:
Conrad E. Snow
Chairman
Loyalty Security Board

Enclosures:

Regulations and Procedures of the
Department of State,
Notice regarding Evidence.

113 Filed November 1, 1952

EXHIBIT F

Stipulation between Hiram Bingham, Chairman of the Loyalty Review Board, and C. E. Rhetts, counsel for John Stewart Service.

It is agreed by and between C. E. Rhetts, Attorney for John Stewart Service, and Hiram Bingham, Chairman of the Loyalty Review Board, that the matter of John Stewart Service, an employee of the Department of State, is now before the Loyalty Review Board for consideration under Regulation 14 of the Statement, Regulations and Directives of the Loyalty Review Board, and that heretofore Service has been afforded a hearing before a panel of the Loyalty Review Board, composed of George W. Alger, Henry L. Shattuck and John K. Clark, at which time considerable evidence was taken as to whether or not John Stewart Service disclosed information of a confidential or non-public character within the meaning of subparagraph d of paragraph 2a of Part V, Standards, of Executive Order No. 9835, as amended. In a review of the letter of charges preferred against John Stewart Service on March 24, 1950 by the Department of State it is noted that the specific charges set forth under Executive Order No. 9835, as amended, are within the meaning of Section 392.2 of the regulations and procedures of the Department of State, which are in substance subparagraph f of paragraph 2a of Part V, Standards, of Executive Order No. 9835, as amended, and said letter of charges does not state specifications regarding the intentional and unauthorized disclosure of information of a confidential or non-public character. Therefore, in order that the Loyalty Review Board may follow its orderly processes of review and to avoid returning the case to the Department of State for an amendment to the said letter of charges,

114 It is hereby stipulated by and between C. E. Rhetts, Attorney for John Stewart Service, and Hiram Bingham, Chairman of the Loyalty Review Board, that the said panel of the Loyalty Review Board may consider the entire matter and make a determination thereon as if the original letter of charges served on John Stewart Service,

dated March 24, 1950, contained the following specification within the meaning of section 392.2d of the regulations and procedures of the Department of State:

> "Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States."

Provided, however, that the case before this Board shall be considered as if the Department of State Loyalty-Security Board had made a determination that no reasonable doubt of Service's loyalty exists when the facts are considered in relation to said section 392.2d and that the foregoing stipulation shall not be deemed to alter or affect in any way the significance properly attributable to the failure of the Department of State in fact to lay a charge of disloyalty under said section 392.2d and its determination instead to lay a security risk charge under section 393.1a of its regulations.

/s/ C. E. Rhetts
C. E. Rhetts
Attorney for John Stewart Service

/s/ Hiram Bingham
Hiram Bingham
Chairman, Loyalty Review Board

Washington, D. C.
December 4, 1951

115 Filed November 1, 1952

EXHIBIT G

UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D. C.

December 13, 1951

The Honorable
The Secretary of State

Sir:

Reference is made to the case of John Stewart Service, Foreign Relations Officer of the Department of State.

This case came to the attention of the Loyalty Review Board on post-audit after a favorable finding by the Loyalty Security Board of the Department of State. A panel of the Loyalty Review Board was duly assigned to review the matter and, on March 3, 1950, the panel recommended that it be remanded to the Loyalty Security Board of the Department of State for a hearing on charges. Thereafter, the employee was duly presented with a letter of charges and notice of proposed removal action, dated March 24, 1950, in accordance with Executive Order No. 9835. Subsequently, a hearing was held by the Loyalty Security Board of the Department of State and said Board reaffirmed its decision, favorable to the employee. Pending reconsideration of this decision on post-audit, supplementary information was received from the Federal Bureau of Investigation and the complete file was returned to the Loyalty Security Board of the Department of State for such consideration as it deemed advisable. Executive Order No. 9835 was amended by Executive Order No. 10241 on April 28, 1951 and the case was considered by the Loyalty Security Board of the Department of State under the

amendment to Executive Order No. 9835 and that Board thereafter reaffirmed its favorable action.

116. The case again came before the Loyalty Review Board on post-audit and, under date of October 9, 1951, the panel of the Loyalty Review Board determined that it was necessary to hold a hearing before the panel of the Loyalty Review Board under its Regulation 14.

A hearing was accordingly held by the panel at the offices of the Loyalty Review Board in Washington, D. C., on November 8, 1951, at which the employee was present and testified and was represented by his counsel, Charles Edward Rhetts of Washington, D. C.

On December 4, 1951, a stipulation was entered into by and between Hiram Bingham, Chairman of the Loyalty Review Board, and C. E. Rhetts, Attorney for John Stewart Service, wherein it was stipulated "that the said panel of the Loyalty Review Board may consider the entire matter and make a determination thereon as if the original letter of charges served on John Stewart Service, dated March 24, 1950, contained the following specification within the meaning of section 392.2d of the regulations and procedures of the Department of State:

> "'Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States'."

A copy of said stipulation is attached hereto.

Thereafter, the said panel of the Loyalty Review Board, upon a consideration of all the evidence and the complete file in the matter, found that there is a reasonable doubt as to the loyalty of said employee, John Stewart Service, to the Government of the United States. A copy of the decision of the panel is also attached hereto.

The Loyalty Review Board found no evidence of membership in the Communist Party or in any organization
117 on the Attorney General's list on the part of John Stewart Service. The Loyalty Review Board did find that there is a reasonable doubt as to the loyalty of the employee, John Stewart Service, to the Government of the United States, based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character within the meaning of subparagraph d of paragraph 2 of Part V, "Standards," of Executive Order No. 9835, as amended.

The Loyalty Review Board hereby submits to the Secretary of State its opinion: The employee, John Stewart Service, should be forthwith removed from the rolls of the Department of State; the Secretary should approve and adopt the proceedings had, as heretofore recited herein; and such approval and adoption should appear on Standard Form 50, "Notification of Personnel Action."

Please advise the Loyalty Review Board of the effective date of the removal of said employee, John Stewart Service.

For the Loyalty Review Board:

Sincerely yours,
Hiram Bingham
Chairman
Loyalty Review Board

Filed November 1, 1952

EXHIBIT H

DEPARTMENT OF STATE
FOR THE PRESS

DECEMBER 13, 1951 NO. 1088

The Department of State announced today that the Loyalty Review Board of the Civil Service Commission

118 has advised the Department that this Board has found a reasonable doubt as to the loyalty of John Stewart Service, Foreign Service Officer.

Today's decision of the Loyalty Review Board is based on the evidence which was considered by the Department's Board and found to be insufficient on which to base a finding of "reasonable doubt" as to Mr. Service's loyalty or security. Copies of the Opinions of both Boards are attached.

The Department of State's Loyalty Security Board, on July 31, 1951, had reaffirmed its earlier findings that Service was neither disloyal nor a security risk; and the case had been referred to the Loyalty Review Board for post-audit on September 4, 1951. The Loyalty Review Board assumed jurisdiction of Mr. Service's case on October 9, 1951.

The Chairman of the Loyalty Review Board in today's letter to the Secretary (full text attached) noted:

> "The Loyalty Review Board found no evidence of membership in the Communist Party or in any organization on the Attorney General's list on the part of John Stewart Service. The Loyalty Review Board did find that there is a reasonable doubt as to the loyalty of the employee, John Stewart Service, to the Government of the United States, based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character within the meaning of subparagraph d of paragraph 2 of Part V, 'Standards,' of Executive Order No. 9835, as amended."

The Opinion of the Loyalty Review Board stressed the points made above by the Chairman—that is, it stated that the Board was not required to find and did not find Mr. Service guilty of disloyalty, but it did find that his intentional and unauthorized disclosure of confidential documents raised reasonable doubt as to his loyalty. The

119 State Department Board while censoring Mr. Service

for indiscretions, believed that the experience Mr. Service had been through as a result of his indiscretions in 1945 had served to make him far more than normally security conscious. It found also that no reasonable doubt existed as to his loyalty to the Government of the United States. On this point the State Department Board was reversed.

The Chairman of the Loyalty Review Board has requested the Secretary of State to advise the Board of the effective date of the separation of Mr. Service. This request stems from the provisions of Executive Orders 9835 and 10241—which established the President's Loyalty Program—and the Regulations promulgated thereon. These Regulations are binding on the Department of State.

The Department has advised the Chairman of the Loyalty Review Board that Mr. Service's employment has been terminated.

LETTER FROM THE CHAIRMAN OF THE LOYALTY REVIEW BOARD TO THE SECRETARY OF STATE:

December 13, 1951

[The full text of this letter is printed as Exhibit G hereto, at pages 33-35.]

OPINION OF THE LOYALTY SECURITY BOARD OF THE DEPARTMENT OF STATE

October 6, 1950

[The full text of the opinion of the Loyalty Security Board of the Department of State is printed as Exhibit B hereto, at pages 12-28.]

OPINION OF THE LOYALTY REVIEW BOARD

December 12, 1951

[The full text of the opinion of the Loyalty Review Board is printed as Exhibit A hereto, at pages 1-11.]

366 Filed November 1, 1952

EXHIBIT M

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

April 1, 1952

Reilly, Rhetts and Ruckelshaus
Tower Building
14th and K Streets, N. W.
Washington 5, D. C.

Attention: C. E. Rhetts, Esq.

Dear Mr. Rhetts:

Reference is made to your letter of January 7, 1952 to the United States Civil Service Commission in the matter of John Stewart Service.

Please be advised that the decision rendered by the Loyalty Review Board to the Secretary of the Department of State was in the nature of a recommendation. The Secretary of State acting upon the recommendation terminated the services of Mr. Service pursuant to
367 Executive Order 9835 as amended and Public Law 188, section 103, 82nd Congress approved October 22, 1951.

The Civil Service Commission has no power to review the action of a Department Head involving the dismissal of an employee for reasons of loyalty and security and furthermore it is noted that Mr. Service was a Foreign Service officer, an employee in a service in which the employment and dismissal of persons is within the exclusive province of the Secretary of the Department of State.

Under the circumstances outlined above the Commission cannot take the actions requested in your letter.

By direction of the Commission.

Sincerely yours,

Robert Ramspeck
Chairman

120 Filed October 20, 1953, Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4967-52

JOHN S. SERVICE, 123-35 82nd Road, Kew Gardens 15, New York, New York, *Plaintiff*,

v.

HIRAM BINGHAM, Individually and as Chairman of the Loyalty Review Board of the United States Civil Service Commission, JOHN KIRKLAND CLARK, HENRY L. SHATTUCK, GEORGE W. ALGER, BERTRAM L. FRENCH, HARRY W. BLAIR, JOHN H. AMEN, BRADFORD BOSLEY, HENRY L. BOWDEN, PHILIP O. COFFIN, CLEM W. COLLINS, HARRY W. COLMERY, EDWIN A. COTTRELL, MARION WADE DOYLE, CATHERINE PRATT FIELD, DR. META GLASS, PAUL M. HERBERT, MARSHALL B. HENSHAW, JOHN H. HESSEY, GARRETT S. HOAG, ALBERT E. JENNER, JR., WILLARD L. KING, HENRY PARKMAN, ROLLIN B. POSEY, HENRY REINING, JR., MURRAY SEASONGOOD, JUDGE A. E. STEADMAN, ANDREW STEERS, C. NILS TAVARES, JAMES F. TWOHY, ELIOT WADSWORTH, Individually and as Members of the Loyalty Review Board of the United States Civil Service Commission; PHILIP YOUNG, Individually and as Chairman of the United

States Civil Service Commission, FREDERICK LAWTON, GEORGE M. MOORE, Individually and as Members of the United States Civil Service Commission; JOHN FOSTER DULLES, Individually and as Secretary of State of the United States of America; UNITED STATES CIVIL SERVICE COMMISSION; and the LOYALTY REVIEW BOARD OF THE UNITED STATES CIVIL SERVICE COMMISSION, *Defendants.*

THIRD AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND MANDATORY ORDER

1. This is a civil action for a Declaratory Judgment and a Mandatory Order arising under the Constitution and laws of the United States. The amount in controversy exceeds $3,000, exclusive of interest and costs.

2. Jurisdiction of this Court over the subject matter is founded upon United States Code, Title 28, §§ 1331, 1332, 2201 and 2202, United States Code, Title 5, § 1009 and District of Columbia Code, §§ 11-301, 11-305 and 11-306.

121 3. Hiram Bingham, Chairman, John Kirkland Clark, Henry L. Shattuck, George W. Alger, Bertram L. French, Harry W. Blair, John H. Amen, Bradford Bosley, Henry L. Bowden, Philip O. Coffin, Clem W. Collins, Harry W. Colmery, Edwin A. Cottrell, Marion Wade Doyle, Catherine Pratt Field, Dr. Meta Glass, Paul M. Herbert, Marshall B. Henshaw, John H. Hessey, Garrett S. Hoag, Albert E. Jenner, Jr., Willard L. King, Henry Parkman, Rollin B. Posey, Henry Reining, Jr., Murray Seasongood Judge A. E. Steadman, Andrew Steers, C. Nils Tavares, James F. Twohy, Eliot Wadsworth are members of the Loyalty Review Board of the United States Civil Service Commission, hereinafter called "the Loyalty Review Board." The official residence of each of them is in the District of

Columbia. Said defendants are sued individually and as members of the Loyalty Review Board. Philip Young is Chairman of the United States Civil Service Commission, and Frederick Lawton and George M. Moore are members thereof. The official residence of each of them is in the District of Columbia. Said defendants are sued individually and as members of the United States Civil Service Commission.

4. Defendant John Foster Dulles is Secretary of State of the United States of America and has his official residence in the District of Columbia. Said defendant is sued individually and as Secretary of State of the United States of America.

5. Plaintiff is a citizen of the United States and resides at 123-35 82nd Road, Kew Gardens 15, New York.

6. After serving as Foreign Service Clerk and Vice Consul (Non-Career) at the American Consulate at Kunming, China in 1933 and 1934, plaintiff was in October, 1935 appointed by the President, by and with the consent of the Senate, as a Foreign Service Officer in the lowest beginning grade of such Service.

7. From October, 1935 until December 14, 1951, plaintiff served continuously as a Foreign Service Officer of the United States of America, advancing by promotion to Class 2 of the Foreign Service.

8. By letter dated March 24, 1950 from Conrad E. Snow, Chairman of the Loyalty Security Board of the Department of State, plaintiff was presented with charges (for-
122 mulated pursuant to the regulations and procedures of the Department of State issued under Executive Order 9835, 12 F.R. 1935). The charges were:

> "The specific charges are that within the meaning of Section 392.2.f of Regulations and Procedures of the

Department of State, you are a member of, or in sympathetic association with, the Communist Party which has been designated by the Attorney General as an organization which seeks to alter the form of government of the United States by unconstitutional means; and further that within the meaning of Section 393.1.d of said Regulations and Procedures you are a person who has habitual or close association with persons known or believed to be in the category set forth in Section 393.1.a of said Regulations and Procedures to an extent which would justify the conclusion that you might through such association, voluntarily or involuntarily, divulge classified information without authority."

9. After exhaustive hearings on the charges referred to in paragraph 8, the Loyalty Security Board of the Department of State, in an opinion dated October 6, 1950 (attached to the original complain herein as Exhibit B and hereby incorporated herein by reference as Exhibit B) concluded in part:

"The Loyalty Security Board has given extended, careful and earnest attention to this case, and concludes, on the basis of all the evidence, that reasonable grounds do not exist for belief that John Stewart Service is disloyal to the Government of the United States. The Board further concludes that, notwithstanding a single serious indiscretion in the handling of classified information, he does not constitute a security risk to the Department of State."

10. Following the issuance on April 28, 1951 of Executive Order 10241, 16 F.R. 3690, which amended the standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty, the Loyalty Security Board further considered the case of plaintiff on July 31, 1951 and "determined that no reasonable doubt exists as to his loyalty to the United States Government".

11. The findings of fact and conclusions of the Loyalty

Security Board favorable to plaintiff referred to in paragraphs 9 and 10 were approved and adopted by or on behalf of the Secretary of State.

12. On October 11, 1951, defendant Bingham, in his official capacity as Chairman of defendant Loyalty Review Board notified plaintiff of the determination of defendant Loyalty Review Board to hold a hearing in plaintiff's case in the "public interest" pursuant to Regulation 14 of
123 that Board "based upon the charges heretofore issued to you by the Department of State Loyalty Security Board and the issues to be heard at the hearing will be within the framework of those charges . . .".

13. On November 8, 1951 defendant Loyalty Review Board held a hearing before a panel of three of its members consisting of defendants George W. Alger, John Kirkland Clark and Henry L. Shattuck, supplemented during portions thereof by defendant Bingham, at which plaintiff was present and testified and was represented by counsel. No other witness testified in the course of this hearing.

14. Prior to, or in the course of, the hearing referred to in paragraph 13, plaintiff was furnished with no charges, formal or otherwise, in addition to or other than those with which he had been furnished on March 24, 1950, as alleged in paragraph 8 above.

15. On or about December 3, 1951, defendant Loyalty Review Board notified plaintiff that, after considering a brief filed by his counsel following the hearing of November 8, 1951, defendant Loyalty Review Board desired to add a charge not theretofore preferred against him and to consider his case on the basis of such added charge. Plaintiff was further advised that if he would not agree to a stipulation permitting defendant Loyalty Review Board to consider such added charge, defendant Loyalty Review Board would remand the case to the Department of State

with instructions to initiate new proceedings against plaintiff based on the new charge which it now wished to insert into the case. Plaintiff consented to and did enter into a formal stipulation between plaintiff's counsel and defendant Bingham (attached to the original complaint herein as Exhibit F and herby incorporated herein by reference as Exhibit F).

16. Neither by the stipulation referred to in paragraph 15 nor by any other means did defendant Loyalty Review Board furnish to plaintiff, as required by its regulations, any "notice in writing stating the charges against him in factual detail, setting forth with particularity the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense or explanation."

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17. In neither the formal stipulation nor in any informal agreement, written or otherwise, did plaintiff in any manner agree that defendant Loyalty Review Board was to have any jurisdiction which it did not otherwise have.

18. Plaintiff has never at any time had any hearing of any nature whatsoever upon the charge as added by the stipulation of December 4, 1951, as hereinbefore alleged, nor was he at any time offered any opportunity to have any hearing by any hearing board or body on such added charge.

19. By a letter, dated December 13, 1951 (attached to the original complaint herein as Exhibit G and hereby incorporated herein by reference as Exhibit G) defendant Bingham notified the Secretary of State that defendant Loyalty Review Board had found "that there is a reasonable doubt as to the loyalty of the employee, John Stewart Service, to the Government of the United States, based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character

within the meaning of subparagraph d of paragraph 2 of Part V, 'Standards', of Executive Order 9835, as amended" and enclosed the "decision" of the panel of its members, which was that "the favorable finding of the Loyalty Security Board of the Department of State is accordingly reversed". Said "decision" or opinion was attached to the original complaint herein as Exhibit A and is hereby incorporated herein by reference as Exhibit A.

20. During the course of hearings before the Loyalty Security Board of the Department of State and before defendant Loyalty Review Board, plaintiff was advised that those Boards were in possession of information concerning the substance of conversations between plaintiff and one, Philip J. Jaffe held on April 19, 20, May 8 and 29, 1945 in Jaffe's room in the Statler Hotel in Washington.

21. On information and belief, plaintiff alleges that the Federal Bureau of Investigation had on or shortly prior to April 19, 1945 placed a microphone in the hotel
125 room of the aforementioned Jaffe and had connected the same to a phonographic recording device and did thereby record a portion of or all of certain conversations between plaintiff and Jaffe on April 19, 1945 and, by the same practice and device, a portion of or all of certain conversations between plaintiff and Jaffe in Jaffe's hotel room on April 20, 1945, May 8, 1945 and May 29, 1945. On information and belief, plaintiff further alleges that purported stenographic transcripts of a portion of or all of such recordings were prepared by agents or employees of the Federal Bureau of Investigation and that, at sometime prior to June 26, 1950, the said original recordings were destroyed by the Federal Bureau of Investigation. No original recording of any such conversation has ever come into the possession of plaintiff by any means whatever nor has plaintiff been permitted to hear such recordings at any time by any means whatsoever nor has plaintiff at any

time by any means whatsoever been furnished with or permitted to examine all or any portion of any transcript of such recordings, except a paper exhibited to him on June 26, 1950, by a subcommittee of the Senate Committee on Foreign Relations, established pursuant to Senate resolution 231, 81st Congress, 2d Session, and represented to be a verbatim text of the conversation between plaintiff and Jaffe held on May 8, 1945 which text was in fact a purported partial transcript of said conversation plus a purported summary and characterization of what was said and contains on its face indications that the stenographer or clerk preparing such transcript from the phonographic recording was unable to hear or understand accurately the words employed by plaintiff and Jaffe and that the purported transcript and summaries and characterizations of what was said were in many respects inaccurate, garbled, incomplete and incorrect.

22. On information and belief, plaintiff alleges that, except for digests, summaries, epitomizations and characterizations, of the recordings or notes referred to in paragraph 21 above, and except for plaintiff's own testimony concerning the said conversations, nothing was before either the Loyalty Security Board or defendant Loyalty Review Board reflecting the contents of the said conversations, and alleges more particularly that neither an actual re-
126 cording nor any notes taken by any person listening to the said conversations nor any complete transcript of the said entire conversations was ever before either the Loyalty Security Board or defendant Loyalty Review Board or was considered by either Board.

23. On information and belief, plaintiff alleges that throughout all of the purported transcripts or summaries, prepared as hereinbefore alleged, of the conversations between plaintiff and Jaffe on April 19, 20, May 8 and 29, 1945 in Jaffe's room at the Statler Hotel in Washington,

frequent errors were made in transcribing what was said or in summarizing and characterizing what was said with the result that both the purported stenographic transcriptions of the conversations and the characterizations and summaries thereof were in many respects inaccurate, garbled, incomplete and incorrect.

24. Although plaintiff formally and informally requested the Loyalty Security Board of the Department of State to furnish him with the original recordings of the conversations between plaintiff and Jaffe at the times and places alleged and with transcripts, summaries and characterizations made thereof as alleged, plaintiff was at no time either in the course of the hearing before the Loyalty Security Board, defendant Loyalty Review Board or otherwise, furnished with copies of or permitted to hear any such recording, transcript, summary or characterization of such conversations and plaintiff was furnished no sufficient information by either of such Boards, or in the charges preferred against him as to what he was supposed to have said to Jaffe or as to what Jaffe was supposed to have said to him and was therefore without means of clarifying the purported stenographic transcript of the conversations or the summaries or characterizations thereof or of correcting inaccuracies therein or of explaining them, other than his own recollection of what took place more than 6 years prior to the first of his hearings before the Loyalty Security Board and was without any adequate means of defending himself with respect to any charge which might be made relating to such conversations.

25. No investigative technique or procedure would have been revealed to plaintiff, or otherwise further disclosed by permitting plaintiff to hear the original recordings
127 of such intercepted conversations or to examine the purported transcripts or summaries and characterizations thereof.

26. On information and belief, plaintiff alleges that no confidential informant, as that term is generally understood or is properly used, gave any information either to the Federal Bureau of Investigation or any other security agency of the United States Government concerning any of the said conversations between plaintiff and Jaffe.

27. No consideration of national security or any other proper consideration involving the interests of the United States required or justified either the destruction of the original recordings of the interceptions of the said conversations between plaintiff and Jaffe or the withholding from plaintiff of any recordings, purported transcripts or purported summarizations or characterizations thereof.

28. On information and belief plaintiff alleges that in connection with the investigation of plaintiff's loyalty by the Secretary of State and in connection with the hearings held by the Loyalty Security Board of the Department of State and the hearing held by defendant Loyalty Review Board, neither the Secretary of State, the Loyalty Security Board nor defendant Loyalty Review Board ever requested the Federal Bureau of Investigation to make available to him or them the original recordings of the conversations between plaintiff and Jaffe had on the dates and at the place hereinbefore alleged nor did he or they request that there be made available at either of said hearings the testimony of such person or persons as may have prepared the purported transcripts, summarizations or characterizations of such conversations which were considered by said Boards.

29. As reflected in the opinion of defendant Loyalty Review Board which purported to reverse the finding of the Loyalty Security Board of the Department of State and which purports to be the basis of the direction of defendant Loyalty Review Board that the employment of plaintiff by the Department of State be terminated, the only considera-

tions asserted to form the basis of such reversal and such direction relate to plaintiff's dealings with Jaffe and particularly to his aforementioned conversations with Jaffe.

30. On information and belief, plaintiff alleges
128 that telephone interceptions or wire taps were employed in the course of investigating the so-called "Amerasia Case" and that, particularly, telephone conversations between the several persons arrested on June 6, 1945, in the Amerasia Case, were so intercepted by investigative agents of the United States Government and, more particularly, that such intercepted conversations related in part to plaintiff and reflected the opinion of one or more of the persons, other than plaintiff, arrested in connection with the Amerasia Case, that the persons actively engaged in the Amerasia Case were wasting their time with plaintiff and that he was not only not a Communist but not even a liberal. No security consideration existed in 1950 or thereafter for withholding from plaintiff that portion of the wire tap information relating to him above referred to. At no time before the Loyalty Security Board or the Loyalty Review Board or at any other time has plaintiff been furnished with or in any manner given access to the said portions of the wire taps relating to him or any notes or transcripts thereof.

31. The action of defendant Loyalty Review Board in purporting to reverse the favorable finding of the Loyalty Security Board of the Department of State was not a decision based on the merits of plaintiff's case and the evidence therein relating either to the charge preferred against him by the State Department Loyalty Security Board or to the charge introduced after the Loyalty Review Board's hearing in this case, but was a decision made on the basis of extraneous considerations unrelated to the merits of the case, including, (a) the avoidance of further attacks upon defendant Loyalty Review Board by yielding to the

political clamor hostile to plaintiff as a Government employee; and (b) the utilization of plaintiff's case, without regard to its merits and the evidence therein, as a vehicle by which to express defendant Loyalty Review Board's dissatisfaction with the loyalty program as conducted within the Department of State and to redress or affect the total statistical outcome of hearings conducted by the Loyalty Security Board of the Department of State and otherwise to discipline and bring pressures to bear upon the Loyalty Security Board of the Department of State.

32. Defendant Loyalty Review Board's opinion
129 contains no finding which purports to sustain either the charge preferred against plaintiff by the Loyalty Security Board of the Department of State or the charge added by defendant Loyalty Review Board.

33. The record before defendant Loyalty Review Board contains no substantial evidence that plaintiff ever made any unauthorized disclosure of documents or information of a confidential or non-public character to any person, or that plaintiff ever made such an unauthorized disclosure under circumstances indicating his disloyalty to the United States.

34. Without affording plaintiff any opportunity to appeal to him or address any arguments to him, although requested so to do by plaintiff, the Secretary of State determined, within four hours of receipt of defendant Bingham's letter of December 13, 1951, to discharge plaintiff and caused a letter to be sent to plaintiff on that date terminating his employment effective at the close of business December 14, 1951.

35. On December 13, 1951, the Secretary of State issued or caused to be issued a public statement in the form of a press release (attached to the original complaint herein as Exhibit H and hereby incorporated herein by reference

as Exhibit H) to which was annexed the letter referred to in paragraph 19, Exhibit G, the opinion of the Loyalty Review Board of the Department of State dated October 6, 1950 and its supplement dated July 31, 1951 (Exhibit B) and the opinion of defendant Loyalty Review Board dated December 12, 1951 (Exhibit A).

36. Neither the Secretary of State nor any agent or representative of his designated for that purpose made any independent decision or recommended decision, either on December 13, 1951 or at any time prior thereto, on the basis of a consideration of the loyalty file in plaintiff's case, that plaintiff's employment as a Foreign Service Officer of the United States should be terminated.

37. The action of the Secretary of State in discharging plaintiff from his employment as a Foreign Service Officer of the United States was based solely upon the ground that this action was, as a matter of law, required
130 as a result of the action of defendant Loyalty Review Board.

38. Plaintiff has in every respect exhausted every administrative remedy available to him.

39. Plaintiff's discharge by the Secretary of State from his employment as a Foreign Service Officer of the United States was in violation of law and invalid, because, though purportedly effected pursuant to the authority conferred on the Secretary of State by Executive Order 9835 (12 F.R. 1935), as amended by Executive Order 10241 (16 F.R. 3690), such discharge in fact violated such Executive Orders and the valid regulations promulgated by defendant Loyalty Review Board pursuant to Part III, Sec. 1, subsection b thereof, in the following grave and highly prejudicial respects:

(a) the Secretary of State was without authority under Executive Order 9835, as amended, to discharge plaintiff

for the reasons assigned by him and his subordinate, Deputy Under Secretary (Administration), namely that defendant Loyalty Review Board's conclusion adverse to plaintiff was mandatory and binding on the Secretary of State and required him to discharge plaintiff;

(b) defendant Loyalty Review Board is without authority under Executive Order 9835 in any case to make, as it purported to make in plaintiff's case, a determination binding upon the head of an employing department with respect to the loyalty of any government employee;

(c) defendant Loyalty Review Board had no authority to make an advisory recommendation to the Secretary of State in respect of plaintiff's loyalty for the reason that defendant Loyalty Review Board was established by Executive Order 9835 to act on the merits of individual cases only in the event of an appeal to it by an employee from a decision of the head of an employing department to discharge such employee on grounds relating to loyalty, whereas no appeal was taken to defendant Loyalty Review Board in plaintiff's case, the finding of the State Department Loyalty Security Board and of the Secretary of State having been favorable to plaintiff;

(d) the Secretary of State had no authority to give any effect whatsoever to defendant Loyalty Review Board's opinion, either as a binding determination or as an advisory recommendation;

131 (e) neither the Secretary of State nor any subordinate delegated by him to make such a determination, determined that on all the evidence there is reasonable doubt as to the loyalty of plaintiff;

(f) plaintiff was denied an opportunity to appeal to the Secretary of State or to such person as he might have designated, from any recommendation or removal;

(g) plaintiff was not served with a notice "stating the charges against him in factual detail, setting forth with particularity the facts and circumstances relating to the

charges so far as security considerations will permit", as required by the regulations of defendant Loyalty Review Board, nor was he accorded the hearing required by Executive Order 9835, as amended, in that, despite his repeated requests therefor, and despite the absence of any necessity for protecting confidential information, he was not at any time furnished with such information as was available, or which should have been available, to the Loyalty Security Board and to defendant Loyalty Review Board in the form of recordings, transcripts, summaries and characterizations of the conversations between plaintiff and Jaffe on April 19 and 20 and May 8 and 29, 1945, which information was relied upon by defendant Loyalty Review Board as the basis for its conclusion that a reasonable doubt exists as to plaintiff's loyalty to the Government of the United States;

(h) neither defendant Loyalty Review Board nor the Secretary of State made reasonable efforts or any efforts to induce all identified non-confidential witnesses who have given pertinent information adverse to plaintiff to attend either the hearing before the Loyalty Security Board or defendant Loyalty Review Board and testify in plaintiff's presence and subject themselves to cross-examination, as required by the regulations of defendant Loyalty Review Board;

(i) in reaching its decision in plaintiff's case, defendant Loyalty Review Board considered and relied upon matters not properly before it and not proper for consideration as evidence by it, in that it considered and relied upon recordings or purported transcripts, summaries or characterizations, made by unknown persons, of the conversations between plaintiff and Jaffe on April 19 and 20 and
132 May 8 and 29, 1945, which were never in any manner furnished plaintiff and which were not introduced as evidence in the record of the Loyalty Security Board or of defendant Loyalty Review Board, in consequence of

which plaintiff was denied an opportunity to challenge their accuracy and reliability and to cross-examine the person or persons who purported to make such transcripts, summaries or characterizations;

(j) plaintiff was never accorded a hearing upon the charges which defendant Loyalty Review Board purported to sustain and on the basis of which it purported to find a reasonable doubt of plaintiff's loyalty;

(k) plaintiff was not accorded the hearing intended by the Executive Order nor was defendant Loyalty Review Board's conclusion against him based on all the evidence as required by the Executive Order, in that the Loyalty Review Board did not make available to plaintiff information favorable to him which was or should have been available to it;

(l) defendant Loyalty Review Board's conclusion that there is reasonable doubt as to plaintiff's loyalty to the United States is arbitrary and unreasonable in that it is based upon no finding which purports to sustain either the charge preferred against him by the State Department Loyalty Security Board, or the charge added by defendant Loyalty Review Board;

(m) there is no substantial evidence in the record before defendant Loyalty Review Board that plaintiff is, or ever was, a member of, or in sympathetic association with, the Communist Party, or that plaintiff ever made any "intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of confidential or non-public character . . .";

(n) plaintiff was not accorded the hearing intended by the Executive Order because defendant Loyalty Review Board reached its conclusion against him because of bias and prejudice and as a result of a prejudgment of plaintiff's case and on the basis of considerations other than the evidence for and against plaintiff.

40. Plaintiff's discharge by the Secretary of State from his employment by the State Department of the United States was invalid and was not authorized by Sec-
133 tion 103, Public Law 188, 82nd Congress, in that.

(a) in discharging plaintiff neither the Secretary nor his Deputy Under Secretary (Administration) purported to make any determination that such discharge was "necessary or advisable in the interests of the United States" but acted solely for the reason that plaintiff's discharge was mandatory upon them under Executive Order 9835, as amended, in consequence of the action of defendant Loyalty Review Board;

(b) in connection with plaintiff's discharge, the Secretary of State did not personally make a determination that such discharge was "necessary or advisable in the interests of the United States", although the making of such a determination is required in order to effectuate the lawful termination of the employment of an officer or employee pursuant to Section 103, Public Law 188, 82nd Congress;

(c) in connection with plaintiff's discharge, the Secretary of State did not accept or adopt the determination of any subordinate officer of the Department of State that such discharge was "necessary or advisable in the interests of the United States"; and no subordinate officer or representative of the Secretary of State made any such determination;

(d) the Secretary of State was without authority under Section 103, Public Law 188, 82nd Congress, to terminate plaintiff's employment with the Department of State solely on the basis of the findings and opinion of defendant Loyalty Review Board or on the basis of the directions contained in defendant Bingham's letter of December 13, 1951 to the Secretary of State because,

(1) the authority conferred upon the Secretary of State to make determinations with respect to the termination of employment of officers or employees of the Department

of State by Section 103, Public Law 188 may not lawfully be delegated by the Secretary of State to another agency of the Government of the United States or to any part thereof or to any individuals who are not subordinates of the Secretary of State or officers of the Department of State;

(2) the Secretary of State has never delegated or purported to delegate the authority conferred upon him by Section 103, Public Law 188 to defendant Loyalty Review Board or to any of its members;

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(3) as elsewhere herein alleged, the proceedings held by defendant Loyalty Review Board and its findings in respect to plaintiff in numerous respects failed to conform to the requirements of Executive Order 9835, as amended, and to the requirements of the Constitution of the United States and, accordingly, its purported reversal of the findings and determination of the Secretary of State and his Loyalty Security Board was without validity or force and should have been disregarded.

41. Plaintiff's discharge by the Secretary of State from his employment as a Foreign Service Officer of the United States was in violation of law and invalid in that prior thereto plaintiff was accorded no hearing before the Board of the Foreign Service as required by the Act of August 13, 1946, c. 951, Title VI, §§ 637, 638, 60 Stat. 1016, 22 USCA, §§ 1007, 1008.

42. The Secretary of State's discharge of plaintiff from his employment deprived plaintiff of rights guaranteed him by the Fifth Amendment to the Constitution of the United States in that such discharge was made on the basis of the findings and opinion of defendant Loyalty Review Board which were promulgated,

(a) without according to plaintiff a fair opportunity to defend himself against charges pertaining to his loyalty, because of the unjustified failure to give him adequate

notice of those charges and information favorable to him which was or should have been in the possession of the Loyalty Security Board or defendant Loyalty Review Board as well as that information against him which supplied the major bases of the conclusion against him;

(b) without a fair adjudication of the charges pertaining to plaintiff's loyalty, because the conclusion against him was not based on all, or the most reliable, evidence pertaining thereto;

(c) on the basis of a conclusion against plaintiff by defendant Loyalty Review Board which was biased and prejudiced, had prejudged plaintiff's case and made its finding and issued its opinion on the basis of political pressures rather than on the basis of the evidence for and against plaintiff;

(d) on the basis of a wholly irrational, arbitrary and unsupported conclusion that there was reasonable
135 doubt of plaintiff's loyalty to the Government of the United States;

(e) although in fact plaintiff is not and was not a person of doubtful loyalty to the Government of the United States, and his discharge on this ground and a determination to this effect is and was wholly unreasonable;

(f) without the regular and orderly procedure, with the safeguards of the right to appeal and the right to an adjudication by the head of the employing department as to the employee's loyalty, which is and was customarily and regularly accorded to other employees in plaintiff's situation and against whom similar charges are or have been brought;

(g) without according to plaintiff a judicial trial on the charges against him before an impartial jury under circumstances in which he was clearly informed of the charge against him, with opportunity to confront and cross-examine the witnesses against him;

(h) on the basis of the activities of plaintiff in connection with Jaffe in April or May 1945, whereas Executive Order 9835 was issued on March 21, 1947 and, as applied to the said activities of plaintiff with Jaffe, is, therefore, *ex post facto*.

43. The action of the Secretary of State in announcing to the press on December 13, 1951 that he had discharged plaintiff on the ground that defendant Loyalty Review Board had found reasonable doubt as to plaintiff's loyalty and in simultaneously releasing to the press defendant Bingham's letter directing this discharge and the opinion of defendant Loyalty Review Board and the action of defendant Bingham in publishing his letter to the Secretary of State and the opinion of defendant Loyalty Review Board, deprived plaintiff of his common law right to be free from unjustified defamation of character in violation of the guarantees of the Fifth Amendment to the Constitution, in that the proceedings, as a result of which plaintiff was discharged on December 13, 1951, denied him due process of law and were otherwise illegal in the respects and for the reasons more particularly alleged above.

44. The discharge of plaintiff from the Department of State by the Secretary of State on December 13, 1951, upon the basis of the opinion of defendant Loyalty Review
136 Board and the letter of December 13, 1951 from defendant Bingham directing plaintiff's discharge and the attendant branding of plaintiff as a person of doubtful loyalty, constituted the imposition upon plaintiff of punishment, which punishment could not lawfully be imposed by a procedure which did not afford plaintiff all of the safeguards of a judicial trial. The proceedings hereinbefore alleged which led to plaintiff's discharge on December 13, 1951 did not accord plaintiff such safeguards and were, accordingly, unlawful and void, in violation of

the Sixth Amendment to the Constitution of the United States.

45. Every activity of any kind whatsoever of plaintiff in connection with Jaffe, which activities comprise the sole ground upon which defendant Loyalty Review Board purported to find that a reasonable doubt existed as to plaintiff's loyalty, took place in April or May 1945. Executive Order 9835 was issued on March 21, 1947 and, therefore, insofar as applied to the said activities of plaintiff with Jaffe, is an *ex post facto* law which is unlawful under Article I, Section 9, of the Constitution of the United States.

46. Plaintiff has no full and adequate remedy at law for the irreparable damage he has suffered and continues to suffer as a result of his unlawful discharge from his employment by the State Department, his loss of his career in the Foreign Service of the United States, his loss of numerous valuable property rights incident to his status as a Foreign Service Officer, and as a result of the grave and continuing injury to his reputation resulting from the illegal defamation of his character by the publication of defendants' purported finding of a reasonable doubt as to his loyalty to the Government of the United States.

WHEREFORE, plaintiff prays,

I

1. That his discharge by the Secretary of State be declared void and invalid, in that it violates the Constitution of the United States, The Foreign Service Act of 1946, Section 103 of Public Law 188, 82nd Congress, and Executive Order 9835, as amended, and valid regulations issued pursuant thereto.

437 2. That defendants Civil Service Commission, Loyalty Review Board and its defendant members be directed to withdraw and vacate the letter of direction addressed by defendant Bingham to the Secretary of State

on December 13, 1951 and the findings, opinion and purported order of reversal issued by defendant Loyalty Review Board and defendants Bingham, Alger, Clark and Shattuck.

3. That all defendants be directed to expunge from their records the said letter from defendant Bingham to the Secretary of State dated December 13, 1951, together with the findings, opinion and purported order of reversal of defendant Loyalty Review Board and defendants Bingham, Alger, Clark and Shattuck and that the Secretary of State further be directed to expunge from the records of the Department of State all written statements of any kind reflecting that plaintiff's employment has been terminated by the Department of State on the ground that there was or is reasonable doubt as to plaintiff's loyalty to the Government of the United States.

4. That the defendant Secretary of State be directed to reinstate plaintiff to his employment and former grade in the Foreign Service of the United States and to restore to plaintiff property rights incident to his status as a Foreign Service Officer of which he was illegally deprived, and to pay to plaintiff the salary he would have earned in such employment from the date of his discharge to the date of his reinstatement.

5. That all defendants be directed to accompany their actions taken pursuant to the above prayers with a full retraction of the defamatory matters uttered and published against plaintiff and to accompany said retractions with the same, or as nearly as may be, the same public notice through the public press and otherwise as the public notices which attended plaintiff's discharge and the publication of the defamatory matter uttered by defendants.

II

Plaintiff believes that in the instant case, involving grave questions of the rights of the person, the complete denial

to plaintiff of what due process of law guaranteed him by the Fifth Amendment to the Constitution of the United States, as well as the rights guaranteed him by the Sixth Amendment to the Constitution of the United States, as hereinabove alleged, requires that this Court take the action prayed in Part I of this prayer. However, in the event that this Court should conclude that the actions complained of in this case were taken in accordance with Executive Order 9835, as amended, and that defendants' failure, in connection with plaintiff's discharge from his employment and in connection with the unjustified defamation of his character, as alleged above, to accord plaintiff due process of law as required by the Fifth Amendment and the rights guaranteed him by the Sixth Amendment may be rectified in this Court plaintiff, in that event, prays that the discharge of plaintiff from his employment by the State Department and the findings, opinion and purported order or reversal promulgated by defendant Loyalty Review Board be reviewed by this Court and set aside as contrary to law and fact and that on such complete review, including a full judicial trial of the charge against him, this Court shall thereupon grant the relief prayed in Part I of this proper.

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III

For such other and further relief as to this Court seems proyer.

/s/ C. E. RHETTS
C. E. RHETTS
Attorney for John Stewart Service
Plaintiff

REILLY, RHETTS & RUCKELSHAUS
1401 K Street, N. W.
Washington 5, D. C.
Of Counsel

Dated: October 20, 1953.

139 Filed November 30, 1953, Harry M. Hull, Clerk

ANSWER

Defendants answer the allegations of the third amended complaint as follows:

1. Defendants deny the allegations of paragraph 1 of the third amended complaint.

2. Defendants deny the allegations of paragraph 2 of the third amended complaint.

3. Defendants deny that defendants Hiram Bingham, John Kirkland Clark, Henry L. Shattuck, George W. Alger, Bertram H. French, Harry W. Blair, John W. Amen, Bradford Bosley, Henry L. Bowden, Philip O. Coffin, Clem W. Collins, Harry W. Colmery, Edwin A. Cottrell, Marion Wade Doyle, Catherine Pratt Field, Dr. Meta Glass, Paul M. Herbert, Marshall B. Henshaw, John H. Hessey, Garrett S. Hoag, Albert E. Jenner, Jr., Willard L. King, Henry Parkman, Rollin B. Posey, Henry Reining, Jr., Murray Seasongood, Judge A. E. Steadman, Andrew Steers, C. Nils Tavares, James F. Twohy, and Eliot Wadsworth are members of Loyalty Review Board of the United States Civil Service Commission. Defendants allege that said named defendants (other than defendants Edwin A. Cottrell and Catherine Pratt Field) ceased to be members of said Loyalty Review Board on September 24, 1953, on which date said Loyalty Review Board ceased to exist, pursuant to Executive Order 10450 (April 27, 1953, 18 F.R.
140 2489). Defendants allege that defendant Edwin A. Cotfrell died in February 1953 and that defendant Catherine Pratt Field resigned as a member of the Loyalty Review Board on December 1, 1952. Defendants allege that this cause is moot as to defendant the Loyalty Review Board and as to all individual defendants sued as members thereof.

Defendants admit the remaining allegations of paragraph 3 of the third amended complaint.

4. Defendants admit the allegations of paragraph 4 of the third amended complaint.

5. Defendants admit the allegations of paragraph 5 of the third amended complaint.

6. Defendants admit the allegations of paragraph 6 of the third amended complaint.

7. Defendants admit the allegations of paragraph 7 of the third amended complaint.

8. Defendants admit the allegations of paragraph 8 of the third amended complaint. Defendants allege that in addition to said written letter of charges plaintiff, either directly or through his counsel, was given oral amplification and detailed specification of such charges by Allen B. Moreland, Legal Officer of the Loyalty Security Board of the Department of State, and by the members of said Loyalty Security Board during the course of the hearings held by said Loyalty Security Board on said charges against plaintiff.

9. Defendants admit the allegations of paragraph 9 of the third amended complaint.

10. Defendants admit the allegations of paragraph 10 of the third amended complaint.

11. Defendants admit that the findings of fact and conclusions of the Loyalty Security Board favorable to plaintiff were approved by Carlisle H. Humelsine, Deputy Undersecretary of State, pursuant to authority delegated to him by the Secretary of State.

141 12. Defendants admit the allegations of paragraph 12 of the third amended complaint. Defendants allege that a true copy of the letter dated October 11, 1951,

to plaintiff from defendant Bingham as Chairman of defendant Loyalty Review Board is set forth in paragraph 108 of the original complaint in this action, which copy is hereby incorporated by reference in this answer.

13. Defendants admit the allegations of paragraph 13 of the third amended complaint.

14. Defendants deny the allegations of paragraph 14 of the third amended complaint. Defendants allege that in addition to the written letter of charges alleged in paragraph 8 of the third amended complaint, plaintiff, either directly or through his counsel, was given oral amplification and detailed specifications of such charges by Allen B. Moreland, Legal Officer of the Loyalty Security Board of the Department of State, and by the members of said Loyalty Security Board during the course of the hearings held by said Loyalty Security Board on said charges against plaintiff.

15. Defendants admit the allegations of paragraph 15 of the third amended complaint.

16. Defendants deny the allegations of paragraph 16 of the third amended complaint. In the alternative defendants allege that the stipulation referred to in paragraph 15 of the third amended complaint constituted a waiver by plaintiff of any requirement of a notice in writing stating the charges set forth in said stipulation.

17. Defendants deny the allegations of paragraph 17 of the third amended complaint.

18. Defendants deny the allegations of paragraph 18 of the third amended complaint.

19. Defendants admit the allegations of paragraph 19 of the third amended complaint.

20. Defendants admit the allegations of paragraph 20 of the third amended complaint.

142 21. Defendants admit the allegations of the first sentence of paragraph 21 of the third amended complaint. In answer to the second sentence of paragraph 21 of the third amended complaint, defendants allege that some of the original recordings of the conversations between plaintiff and Jaffe have been destroyed but allege that others of said original recordings have not been destroyed. For lack of knowledge and information sufficient to form a belief, defendants deny the allegations of the third sentence of paragraph 21 of the third amended complaint.

22. For lack of knowledge and information sufficient to form a belief, the defendants deny the allegations of paragraph 22 of the third amended complaint.

23. For lack of knowledge and information sufficient to form a belief, the defendants deny the allegations of paragraph 23 of the third amended complaint.

24. Defendants deny the allegations of paragraph 24 of the third amended complaint.

25. Defendants deny the allegations of paragraph 25 of the third amended complaint.

26. For lack of knowledge and information sufficient to form a belief, the defendants deny the allegations of paragraph 26 of the third amended complaint.

27. Defendants deny the allegations of paragraph 27 of the third amended complaint.

28. Defendants deny the allegations of paragraph 28 of the third amended complaint.

29. Defendants admit the allegations of paragraph 29 of the third amended complaint.

143 30. For lack of knowledge and information sufficient to form a belief, defendants deny the allegations

of the first and third sentences of paragraph 30 of the third amended complaint. Defendants deny the allegations of the second sentence of paragraph 30 of the third amended complaint.

31. Defendants deny the allegations of paragraph 31 of the third amended complaint.

32. Defendants deny the allegations of paragraph 32 of the third amended complaint.

33. Defendants deny the allegations of paragraph 33 of the third amended complaint.

34. Defendants deny the allegations of paragraph 34 of the third amended complaint, except that they admit that on December 13, 1951, the Secretary of State determined to discharge plaintiff and caused a letter to be sent to plaintiff on that date terminating his employment effective at the close of business December 14, 1951.

35. Defendants admit the allegations of paragraph 35 of the third amended complaint.

36. Defendants deny the allegations of paragraph 36 of the third amended complaint, except that they admit that the Secretary of State, in determining that plaintiff's employment as a foreign service officer of the United States should be terminated, did not read the testimony taken in plaintiff's case before the Loyalty Security Board or that taken before the Loyalty Review Board.

37. Defendants deny the allegations of paragraph 37 of the third amended complaint.

38. Defendants admit the allegations of paragraph 38 of the third amended complaint.

144 39. Defendants deny the allegations of paragraph 39 of the third amended complaint.

40. Defendants deny the allegations of paragraph 40 of the third amended complaint.

41. Defendants deny the allegations of paragraph 41 of the third amended complaint.

42. Defendants deny the allegations of paragraph 42 of the third amended complaint.

43. Defendants deny the allegations of paragraph 43 of the third amended complaint.

44. Defendants deny the allegations of paragraph 44 of the third amended complaint.

45. Defendants deny the allegations of paragraph 45 of the third amended complaint.

46. Defendants deny the allegations of paragraph 46 of the third amended complaint.

ADDITIONAL DEFENSES

1. The third amended complaint fails to state a claim upon which any relief can be granted.

2. As to defendants the Loyalty Review Board and the individual defendant members thereof the case is moot.

WARREN E. BURGER
Assistant Attorney General

EDWARD H. HICKEY
Attorney, Department of Justice

DONALD B. MACGUINEAS
Attorney, Department of Justice

146 Filed July 15, 1954, Harry M. Hull, Clerk

REQUEST FOR ADMISSIONS

Plaintiff requests the defendants, and more particularly the defendants Philip Young, individually and as Chairman of the United States Civil Service Commission, Frederick Lawton and George M. Moore, individually and as members of the United States Civil Service Commission; John Foster Dulles, individually and as Secretary of State of the United States of America, within twenty (20) days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may subsequently be interposed, that each of the following statements is true:

1. With respect to the conversations between plaintiff and Philip J. Jaffe held on April 19, 20 and on May 8 and 29, 1945 in Jaffe's room in the Statler Hotel in Washington, D. C., which conversations were recorded in whole or in part, by agents of the Federal Bureau of Investigation, purported summaries or digests of all of such recordings were prepared by agents or employees of the Federal Bureau of Investigation and were furnished to the Loyalty Review Board for consideration in the determination of plaintiff's loyalty.

2. With respect to the conversations described in Paragraph 1 above, no recording or exact transcript of the text thereof was made available either to the Loyalty
147 Security Board or the Loyalty Review Board in determining plaintiff's loyalty.

3. Nothing was made available either to the Loyalty Security Board or the Loyalty Review Board, in determining plaintiff's loyalty which reflected the contents of the conversations described in Paragraph 1 above, except for (a) the purported summaries or digests mentioned above, and (b) plaintiff's own testimony.

4. No person, other than the agents or employees of the Federal Bureau of Investigation who recorded or summarized or supervised the recording or summarization of such conversations, gave any statement as to the contents of any of the above described conversations between plaintiff and Jaffe which were made available either to the Loyalty Security Board or the Loyalty Review Board in determining plaintiff's loyalty.

/s/ C. E. Rhetts
C. E. Rhetts
Attorney for Plaintiff
1120 Tower Building
Washington 5, D. C.

149 Filed Oct. 22, 1954, Harry M. Hull, Clerk

Defendants admit the truth of the statements contained in the request for admissions numbered 1 through 4 filed by plaintiff July 15, 1954.

/s/ Warren E. Burger
Warren E. Burger
Assistant Attorney General

/s/ Edward H. Hickey
Edward H. Hickey
Attorney, Department of Justice

/s/ Donald B. MacGuineas
Donald B. MacGuineas
Attorney, Department of Justice
Counsel for Defendants

DISTRICT OF COLUMBIA
CITY OF WASHINGTON } ss:

Donald B. MacGuineas, being first duly sworn, deposes and states as follows: I am an attorney in the Department of Justice and counsel for the defendants in this action. To the best of my knowledge and belief the above Defendants' Response to Plaintiff's Request for Admission is true.

/s/ DONALD B. MACGUINEAS

Subscribed and sworn to before me this 22nd day of October, 1954.

/s/ MADELINE MACDONALD
Notary Public, D. C.

[SEAL]

My commission expires:
January 14, 1956.

151 Filed Apr. 15, 1955, Harry M. Hull, Clerk

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff moves the Court for Summary Judgment in his favor in accordance with the prayer set forth in the Third Amended Complaint, upon the basis of:

(1) the Third Amended Complaint (except for paragraphs 14, 23, 28, 30, 31, and 37 thereof);
(2) the Admissions contained in the Defendants' Answer;
(3) the Admissions filed in this Court on October 22, 1954, in response to plaintiff's request therefor;
(4) Defendants' Pre-Trial Statement, filed in this Court on February 14, 1955; and
(5) the Affidavit of plaintiff, John S. Service, attached hereto.

In support of his Motion, plaintiff states that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law.

Respectfully submitted,

/s/ C. E. RHETTS
C. E. RHETTS
Attorney for plaintiff.

152 Filed Apr. 15, 1955, Harry M. Hull, Clerk

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss:

AFFIDAVIT

I, JOHN S. SERVICE, being first duly sworn, depose and state:

1. At no time prior to my discharge by the Secretary of State from my position in the Foreign Service of the United States was I accorded or did I receive a hearing before the Board of the Foreign Service.

2. At about midday of December 13, 1951, in the office of my counsel, C. E. Rhetts, I was shown a letter dated December 13, 1951, which had been addressed to Mr. Rhetts by Hiram Bingham, Chairman of the Loyalty Review Board (attached hereto as Annex 5), advising my counsel that the Loyalty Review Board "has reversed the finding of the Loyalty Security Board of the Department of State and has found that there is a reasonable doubt as to the loyalty of John Stewart Service to the Government of the United States." Shortly thereafter, in my presence, my counsel telephoned the Deputy Undersecretary of State (Administration), Carlisle H. Humelsine, and advised him of the receipt of the above-mentioned letter from the Loyalty Review

Board and requested that the Department of State withhold any action in the premises for at least twenty-four hours, so that I might consider what action I might take in the premises, including particularly, the filing of a motion for reconsideration with the Loyalty Review Board and an appeal to the Secretary of State. My counsel sought an immediate interview with Mr. Humelsine. This was denied, but an interview was granted at about 6:00 p.m. on
153 December 13, 1951. This interview was attended by Mr. Humelsine, General Counsel Conrad E. Snow, my counsel and myself. At this time, my counsel renewed his request that any action on the basis of the Loyalty Review Board's decision be withheld until I could address further arguments to the Secretary of State in the premises, pointing out among other things that there was a serious legal question whether the Loyalty Review Board had any authority to review and reverse a decision of the State Department Loyalty Security Board and the Secretary of State which had been favorable to me. Deputy Undersecretary of State Humelsine stated, however, that the Loyalty Review Board's decision that there was a reasonable doubt of my loyalty was binding on the State Department and that it must discharge me in accordance with the decision of the Loyalty Review Board. He declined to withhold immediate action or to give me any further time in which to address any argument or plea to the Secretary of State or to any other official of the Department of State. Deputy Undersecretary Humelsine also stated that the determination to separate me from the Foreign Service had already been reached and that members of the press had been notified, some two hours earlier, that a public statement was about to be issued in connection with my case. At the same time, Mr. Humelsine handed to me an 18 page mimeographed Press Release of the Secretary of State. (Exhibit H to the Complaint.) Mr. Humelsine requested me to return to his office the following morning, December 14, 1951,

which I did and then received from Mr. Humelsine a letter addressed to me by Mr. Humelsine, dated December 13, 1951, announcing my discharge (attached hereto as Annex 1).

3. After charges were preferred against me under Executive Order 9835, they were considered at hearings held by the Loyalty Security Board of the Department of
154 State from May 26 to June 24, 1950. One copy of a stenographic transcript of these hearings was supplied to me by the Loyalty Security Board. While my hearings were continuing before the Loyalty Security Board, hearings were held by a sub-committee of the Senate Committee on Foreign Relations (herein called "Tydings Subcommittee") during the 81st Congress, 2nd Session, pursuant to S. Res. 231, "A Resolution to Investigate Whether There Are Employees in the State Department Disloyal to the United States" (herein called "Tydings Hearings"). On June 22, 23, and 26, I testified before the Tydings Subcommittee and, at its request, furnished to it my only copy of the transcript of my hearings before the Loyalty Security Board of the State Department. The full transcript of my hearings before the Loyalty Security Board of the State Department subsequently appeared at pages 1958—2509 of Part 2 of said Tydings Hearings, published by the Government Printing Office.

4. Pursuant to a letter of Notification addressed to me on October 11th by Hiram Bingham, Chairman, Loyalty Review Board (a copy of which is attached hereto as Annex 4), a hearing was held on November 8, 1951, before a panel of the Loyalty Review Board in my case. A stenographic transcript of said hearing was subsequently furnished to me. A copy of said transcript entitled "Hearing Under Regulation 14 in the Case of Mr. John Stewart Service by a Panel of the Loyalty Review Board, November 8, 1951," is attached hereto as Annex 3.

5. Subsequent to my separation from the Foreign Service, I received from Carlisle Humelsine (Deputy Undersecretary of State, a letter dated December 27, 1951, in response to an inquiry addressed to him by my counsel. A copy of this letter is attached hereto as Annex 2.

155 6. I hereby reaffirm the statement contained in the third sentence of paragraph 21 and in paragraph 24 of the Third Amended Complaint.

7. Neither the Loyalty Security Board of the State Department nor the Loyalty Review Board at any time furnished me with the original recordings of conversations between me and Jaffe which were mechanically recorded, nor did either of such Boards furnish me with any transcripts, summaries, digests, or other information concerning the contents of such conversations, except as is reflected in the transcripts of the hearings before both of said Boards.

8. Following my discharge from the Foreign Service and the publication of the opinion of the Loyalty Review Board that there was a reasonable doubt of my loyalty, I obtained employment in New York City where I am presently employed by Sarco, International, Inc. At no time since my discharge from Foreign Service have my earnings been as great as they were at the time of my discharge.

9. Prior to my discharge from the Foreign Service, I was insured by the Equitable Life Assurance Society under a group life insurance policy issued to the Foreign Service Association. Upon my discharge, all my life insurance was automatically cancelled and the Equitable Life Assurance Society refused to insure my life.

10. In August, 1952, the Equitable Life Assurance refused to accept me and my family as tenants at the Fordham Hill Apartments in New York City, solely because of the

unfavorable publicity concerning me which resulted from my discharge and the publication of the opinion of
156 the Loyalty Review Board.

/s/ JOHN S. SERVICE
JOHN S. SERVICE

Subscribed and sworn to before me this 7th day of April, 1955.

/s/ CHARLOTTE D. KIMBALL
Notary Public, D. C.

[SEAL]

My Commission expires August 14, 1958.

157 Filed Apr. 15, 1955, Harry M. Hull, Clerk

ANNEX 1

DEPARTMENT OF STATE
WASHINGTON

December 13, 1951

My dear Mr. Service:

The Secretary of State was advised today by the Chairman of the Loyalty Review Board of the U. S. Civil Service Commission that the Loyalty Review Board has found that there is a reasonable doubt as to your loyalty to the Government of the United States. This finding was based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character within the meaning of subparagraph d of Paragraph 2 of Part V of Executive Order 9835, as amended. The Loyalty Review Board further advised that it found no evidence of membership on your part in the Communist Party or in any organizations on the Attorney General's list.

Pursuant to the foregoing, the Secretary of State, under the authority of Executive Order 9835, as amended, and

Section 103 of Public Law 188, 82nd Congress, has directed me to terminate your employment in the Foreign Service of the United States as of the close of business December 14, 1951.

In view thereof, you are advised that your employment in the Foreign Service of the United States is hereby terminated effective close of business December 14, 1951.

Sincerely yours,

For the Secretary of State:

CARLISLE H. HUMELSINE
Deputy Under Secretary

MR. JOHN S. SERVICE,
Department of State.

158 Filed Apr. 15, 1955

ANNEX 2

DEPARTMENT OF STATE
WASHINGTON

December 27, 1951

My dear Mr. Service:

Reference is made to the Department's letter to you, dated December 13, 1951, wherein you were advised that your employment in the Foreign Service of the United States was to be terminated as of the close of business December 14, 1951.

Mr. C. E. Rhetts, your attorney, called and requested that the Department clarify its letter to you, particularly with respect to the reason or reasons for the terminations of your services.

As stated in the first paragraph of the letter under reference, the Secretary was advised by the Chairman of the Loyalty Review Board of the United States Civil Service

Commission that the Loyalty Review Board has found that there is a reasonable doubt as to your loyalty to the Government of the United States and that this finding was based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character within the meaning of subparagraph d of paragraph 2 of Part V of Executive Order 9835, as amended. Upon receipt of the Loyalty Review Board's decision, the Secretary directed that your employment in the Foreign Service of the United States be terminated as of the close of business December 14, 1951.

In view of your attorney's request for a clarification, this is to advise that your employment was terminated solely as a result of the aforementioned finding of the Loyalty Review Board of the United States Civil Service Commission.

Sincerely yours,

For the Secretary of State:
CARLISLE H. HUMELSINE
Deputy Under Secretary

300 Filed Apr. 15, 1955, Harry M. Hull, Clerk

ANNEX 4

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

October 11, 1951

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Mr. John S. Service
4608 Butterworth Place
Washington, D. C.

Dear Mr. Service:

Reference is made to the investigation in your case by the Federal Bureau of Investigation under Executive Order 9835, as amended by Executive Order 10241, which established the President's Employee Loyalty Program, and to your hearing before the Department of State Loyalty Security Board. You are advised that the Departmental Board made a determination favorable to you on the matter of loyalty and that the complete file in the case was subsequently reviewed by a panel of members of the Loyalty Review Board under authority of and pursuant to Regulation 14 of the Regulations for the Operations of the Loyalty Review Board.

Regulation 14 reads as follows:

> "The Board, or an Executive Committee of the Board, shall, as deemed necessary from time to time, cause post-audits to be made of the files on loyalty cases decided by the employing Department or Agency, or by a Regional Loyalty Board.
>
> "The Board, or an Executive Committee of the Board, or a duly constituted panel of the Board, shall have the right, in its discretion, to call up for review any determination or decision made by any Department or Agency Loyalty Board or Regional Loyalty Board, or by any head of an employing Department or Agency,

even though no appeal has been taken. Any such review shall be made by a panel of the Board, and the panel, whether or not a hearing has been held in the case, may affirm the determination or decision, or remand the case with appropriate instructions to the Agency or Regional Loyalty Board concerned for hearing or for such further action or procedure as the panel may determine. *In exceptional cases, if in the judgment of the panel public interest requires it, the panel may hold a new hearing* in the case and after such hearing, affirm or reverse the determination or decision."

After review of the complete file, the Loyalty Review Board has determined that "public interest" requires it to hold a new hearing in your case as provided for in the above-mentioned Regulation 14.

301 The hearing before the Loyalty Review Board will be based upon the charges heretofore issued to you by the Department of State Loyalty Security Board and the issues to be heard at the hearing will be within the framework of those charges. The Loyalty Review Board will arrive at an independent judgment in this matter. The transcripts of all testimony taken below are a part of the complete file now before the Loyalty Review Board. However, you are invited to present any evidence you desire in your behalf at the hearing. You may present oral argument and you may, of course, be represented by counsel or other representative.

Arrangements will be made to hold your hearing at Washington, D. C. We are not able at this time to set a date for the hearing. However, you will be notified approximately ten days in advance of the time and hearing room address.

Loyalty Review Board
Very truly yours,
HIRAM BINGHAM
Chairman

302 Filed Apr. 15, 1955, Harry M. Hull, Clerk

ANNEX 5

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

December 13, 1951

Mr. Charles E. Rhetts
Attorney at Law
Tower Building
Washington, D. C.

Dear Mr. Rhetts:

Please be advised that the Loyalty Review Board has this day forwarded to the Department of State its opinion in the matter of John Stewart Service, which it has considered under its Regulation 14.

The Loyalty Review Board has reversed the finding of the Loyalty Security Board of the Department of State and has found that there is a reasonable doubt as to the loyalty of John Stewart Service to the Government of the United States.

Very truly yours,
HIRAM BINGHAM
Chairman
Loyalty Review Board

303 Filed May 5, 1955, Harry M. Hull, Clerk

CROSS-MOTION BY DEFENDANTS FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendants move the Court for summary judgment on the ground that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

This motion is made on the basis of the third amended complaint, the answer, the exhibits to the original complaint, the certified copies of documents attached to this motion as Annexes 1 through 5, the Affidavit of Dean Acheson and the Affidavit of Frank W. Waikart.

/s/ WARREN E. BURGER
WARREN E. BURGER
Assistant Attorney General

/s/ EDWARD H. HICKEY
EDWARD H. HICKEY
/s/ D. B. MACGUINEAS
DONALD B. MACGUINEAS
/s/ F. CAROLYN GRAGLIA
F. CAROLYN GRAGLIA
Attorneys, Department of Justice
Attorneys for Defendants

339 Filed May 5, 1955, Harry M. Hull, Clerk

AFFIDAVIT OF DEAN ACHESON, SECRETARY OF STATE

DISTRICT OF COLUMBIA
CITY OF WASHINGTON } *ss:*

I, Dean Acheson, Secretary of State, being duly sworn, depose as follows:

1. I am the Secretary of State and have been such since January 21, 1949.

2. On December 13, 1951, I received a letter from the Chairman of the Loyalty Review Board of the Civil Service Commission submitting to me that Board's opinion, dated December 12, 1951, in the case of John S. Service, a Foreign Service officer of the Department of State and the plaintiff in this action.

3. On that same day I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.

340 4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.

5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty

Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment.

6. Attached to this affidavit as Exhibits A and B are copies of Notice of Personnel Action (dated December 17, 1951) and Request for Personnel Action and Travel Authorization (dated December 14, 1951) issued by the
341 Department of State Division of Foreign Service Personnel which correctly reflect the action taken to terminate Mr. Service's employment.

/s/ DEAN ACHESON
DEAN ACHESON
Secretary of State

Subscribed and sworn to before me this 19th day of January, 1953.

FRANCES JEAN ESPE
Notary Public
District of Columbia

My commission expires: March 31, 1957.

342 **EXHIBIT A**

Department of State, Division of Foreign Service Personnel. Personnel Action.

Date: Dec. 17, 1951; Journal No. 1. Name: Service, John S.; Date of Birth; Aug. 3, 1909; Service FSO. This is to notify you of the following action concerning your employment, nature of action: termination. Effective date: COB, Dec. 14, 1951.

Functional title: Foreign Service Officer; post, department; class and salary: FSO-2, $11,850; appropriation allotment: 2A-5025; position number: Group 11b; nature of employment: permanent, fulltime with retirement deduc-

tions; sex: male; marital status: married; children and dependents: three.

Conditions and requirements: Above action and continuance of status effected thereby are subject to such conditions and requirements listed on reverse of this page as are cited herewith.

Remarks: Pursuant to the decision of the Loyalty Review Board of December 13, 1951. Termination authority Executive Order 9835, as amended, and Section 103 of Public Law 188, 82nd Congress. Lump-sum payment is hereby authorized for 132 days cumulative and 46 days current annual leave. Payment to be made by the Department. Address: 4608 Butterworth Place, N.W., Washington 16, D. C.

(Signature); Title: Chief, Div. of For. Ser. Personnel.

344 **EXHIBIT B**

Department of State for service United States of America.

Request for P rsonnel Action and Travel Authorization.

Post, Department; Date, Dec. 14, 1951; Married; Male; SERVICE, John S., Aug. 3, 1909; nature of action, termination; effective date 12-14-51; funtional title, Foreign Service Officer; FSO-2—$11,850; post, department; appropriation allotment, 2A-5025; 349 drafted 12-17-51; position number, Group IIB; nature of employment, permanent; retirement deduction, yes.

Added by leave section 12-14-51; lump-sum payment is hereby authorized for 132 days cumulative and 46 days current annual leave. Payment to be made by the Department. Address: 4608 Butterworth Place, N.W., Washington 16, D. C., /s/ Mary L. Mayhew, Acting Chief, Leave & Retirement Unit.

Additional information and instructions—Pursuant to the decision of the Loyalty Review Board of December 13,

1951. Termination authority Executive Order 9835, as amended, and Section 103 of Public Law 188, 82nd Congress. (wife: dau. Virginia b. 7-3-35; son Robert b. 2-17-37; son Philip b. 8-6-45); Singnature of requesting officer, /s/ Ernesto Colantonio, title PER:FP: Ernesto Colantonio; Signature of approving officer, /s/ Howard P. Mace, Chief, Field Operations Branch, Division of Foreign Service Personnel.

Request for travel authorization (not as traveler's request nor for his convenience): from Washington, D. C. to Berkeley, California; purpose of travel and special travel instruction, travel and shipment of effects authorized from Washington, D. C. to Berkeley, California.

350 Filed Jun 30, 1955, Harry M. Hull, Clerk

JOHN S. SERVICE, *Plaintiff*,

v.

HIRAM BINGHAM, ET AL., *Defendants*.

Civil Action No. 4967-52

MEMORANDUM

On September 24, 1953, pursuant to Executive Order 10450, the Loyalty Review Board of the Civil Service Commission ceased to exist and the defendants who had been members of the Loyalty Review Board were retired from their positions. Defendants contend, and plaintiff concedes, that suits against public officials abate upon their retirement from public office. As to those defendants, who were former members of the Loyalty Review Board of the Civil Service Commission, the case is dismissed.

The action of the Loyalty Review Board of the United States Civil Service Commission in this instance is a nullity. As the Supreme Court held in the Peters case, the Board's power of review was limited to "persons recommended for

dismissal on grounds relating to loyalty by the loyalty board of any department or agency."

Petitioner was given hearings before the Loyalty Security Board of the State Department, which Board determined that there was no reasonable doubt as to his loyalty. Under the guise of a "post-audit review" the Loyalty Review Board of the Civil Service Commission took jurisdiction to re-determine the findings of the Loyalty Security Board of the State Department. The action of this Loyalty Review Board being a nullity, the Civil Service Commission is directed to expunge from its records the Loyalty Review Board's finding that there is a reasonable doubt as to plaintiff's loyalty to the United States.

In the Peters case the Loyalty Review Board issued an order debarring the petitioner from future government employment, whereas in the instant case the Board did
351 not issue an order but rendered an opinion based on its findings to the Secretary of State, which opinion, at its best, was merely advisory in that the Secretary was not bound to follow it.

It is now claimed by the plaintiff that since the Secretary's decision was based upon an invalid opinion, the determination made by the Secretary to terminate his services is likewise invalid. On the surface this reasoning would be convincing if it were not for the fact that the power the Congress bestowed on the Secretary of State by Public Law 188 was that of "absolute discretion."

Since 1947 Congress has enacted a rider to each Appropriation Act for the State Department, authorizing the Secretary of State to summarily dismiss officers and employees of that Department. The provision in force on the date of plaintiff's discharge provided as follows:

> "Notwithstanding the provisions of Section 6 of the Act of August 24, 1912 (37 Stat. 555) or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, ter-

minate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interest of the Unitd States."

The notice of plaintiff's termination states that such action was taken pursuant to the aforementioned public law, as well as pursuant to Executive Order 9835, as amended. The former Secretary of State, in support of defendants' motion for summary judgment, states that he exercised his own discretion in determining to terminate plaintiff's employment under the authority vested in him by the aforementioned rider, Public Law 188. In his affidavit he states:

". . . In determining to terminate the employment of Mr. Service I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did exercise that judgment."

352 This Court cannot, of course, review the correctness of the former Secretary of State's determination. Its function is limited to determining whether any procedural requirement of the statue was violated in plaintiff's discharge.

Under Public Law 188 there was one procedural requirement: that the Secretary of State must determine in his discretion that the termination of plaintiff's employment was necessary or advisable in the interests of the United States. That determination the former Secretary of State made.

Plaintiff's contention that by virtue of the State Department's regulations he could not be dismissed under Public

Law 188 unless the procedures prescribed by Executive Order 9835 were followed is without merit. It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 18. This power of summary dismissal would not have been granted the Secretary of State by the Congress if the Congress was satisfied that the interests of this country were adequately protected by Executive Order 9835.

Under Public Law 188 plaintiff could have been summarily dismissed without notice of charges, hearing, or appeal. Plaintiff was advised of the documents which were found in Mr. Jaffe's possession and was permitted to examine the photostats of those documents so that he could identify those documents, copies of which he had loaned to Mr. Jaffe. He was given an exhaustive hearing before the Department of State Loyalty Security Board and presented a number of witnesses, affidavits, and statements. Plaintiff does not deny that he loaned certain documents to Mr. Jaffe.

While the Secretary of State could not terminate plaintiff's service because the Loyalty Review Board of the Civil Service Commission found that there was a reasonable doubt as to plaintiff's loyalty to the United States, nevertheless he could terminate his services if he deemed such termination necessary or advisable in the interests of the United States, and this is so even though the finding and opinion of the Loyalty Review Board of the Civil Service Commission is a nullity.

353 Accordingly plaintiff was validly discharged under Public Law 188 and defendants' cross motion for summary judgment is granted and plaintiff's motion for summary judgment is denied. Counsel for the defendants will prepare the appropriate order.

/s/ EDWARD M. CURRAN
Judge

June 30, 1955

354 Filed Jul 28, 1955, Harry M. Hull, Clerk

Docketed 7/28.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Service Action No. 4967-52
JOHN S. SERVICE, *Plaintiff*,

v.

HIRAM BINGHAM, et al., *Defendants*.

ORDER

This cause having come on for hearing on the motion of the plaintiff for summary judgment and on the cross-motion of defendants for summary judgment, and it appearing that plaintiff was validly discharged pursuant to the provisions of Public Law 188, 65 Stat. 575, 581, but that the finding of the Loyalty Review Board that there is a reasonable doubt as to plaintiff's loyalty was beyond the Board's jurisdiction, in accordance with the Memorandum of the Court, filed June 30, 1955, it is this 26th day of July 1955.

ADJUDGED, ORDERED and DECREED that:

1. This case is dismissed as moot as to defendants Hiram Bingham, John Kirkland Clark, Henry L. Shattuck, George W. Alger, Bertram Lfl French, Harry W. Blain, John H. Amen, Bradford Bosley, Henry L. Bowden, Philip O. Coffin, Clem W. Collins, Harry W. Colmery, Edwin A. Cottrell, Marion Wade Doyle, Catherine Pratt Field, Dr. Meta Glass, Paul M. Herbert, Marshall B. Henshaw, John H. Hessey, Garrett S. Hoag, Albert E. Jenner, Jr., Willard L. King, Henry Parkman, Rollin B. Posey, Henry Reining, Jr., Murray Seasongood, Judge A. E. Steadman, Andrew Steers, C. Nils Tavares, James F. Twohy, and Eliot Wadsworth,

who were former members of the Loyalty Review Board of the Civil Service Commission.

355 2. The Civil Service Commission shall expunge from its records the Loyalty Review Board's finding that theer is a reasonable doubt as to plaintiff's loyalty to the United States.

3. Defendants' cross-motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

/s/ EDWARD M. CURRAN
United States District Judge

July 26, 1955

Consented to as to form:

REILLY, RHETTS & RUCKELHAUS
Attorneys for Plaintiff

By: GERARD D. REILLY

357 Filed July 28, 1955, Harry M. Hull, Clerk

PLTF'S EXHIBIT "10"

COPY

Filed Sep. 23, 1955, Harry M. Hull, Clerk

THE WHITE HOUSE
WASHINGTON
September 6, 1950

My dear Mr. Secretary:

I have appproved H.R. 7786, the "General Appropriation Act, 1951". Section 1213 of the Act provides that "notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any

other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever h shall deem such termination necessary or advisable in the interests of the United States."

I am sure you will agree that in exercising the discretion conferred upon you by Section 1213s, every effort should be made to protect the national security without unduly jeopardizing the personal liberties of the employees within your jurisdiction. Procedures designed to accomplish these two objectives are set forth in Public Law 733, 81st Congress, which authorizes the summary suspension of civilian officers and employees of various departments and agencies of the Government, including the Department of State.

In order that officers and employees of the Department of State may be afforded the same protection as that afforded by Public Law 733, it is my desire that you follow the procedures set forth in that law in carrying ou the provisions of section 1213 of the General Appropriations Act.

Sincerely yours,

/s/ HARRY TRUMAN

The Honorable
The Secretary of State

[Fol. 92] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,958

JOHN S. SERVICE, Appellant

v.

JOHN FOSTER DULLES, et al., Appellees

Appeal from the United States District Court for the District of Columbia

Mr. C. E. Rhetts for appellant.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, with whom *Mr. Paul A. Sweeney,* Attorney, Department of Justice, was on the brief, for appellees.

Before WILBUR K. MILLER, WASHINGTON and BASTIAN, Circuit Judges.

OPINION—June 14, 1956

BASTIAN, *Circuit Judge:* This is an appeal from a judgment granting defendants' (appellees') motion for summary judgment.

Plaintiff (appellant) was formerly a Foreign Service officer, who was dismissed by action of former Secretary of State Acheson. Appellees are the present Secretary of State, members of the Civil Service Commission, and the former members of the Loyalty Review Board of the Civil Service Commission, established by Executive Order No. 9835.

Appellant filed this suit to obtain a judgment declaring his discharge void and invalid; to obtain reinstatement to his employment and his salary from the date of his [fol. 93] discharge to the date of his reinstatement; for the expunging from the record of statements reflecting that this dismissal had been on the ground that there was or is reasonable doubt as to his loyalty to the Government of the United States; and for certain other relief. On cross-motions for summary judgment, the District Court

dismissed the case as moot as to the former members of the Loyalty Review Board of the Civil Service Commission as that Board had ceased to exist and, as to them, the action had abated; directed the Civil Service Commission to expunge from its record the Loyalty Review Board's finding that there was reasonable doubt as to appellant's loyalty to the Government of the United States; granted appellees' cross-motion for summary judgment and denied appellant's motion for summary judgment.

The record discloses that under date of March 24, 1950, the Chairman of the Loyalty Security Board of the Department of State notified appellant that a hearing had been scheduled under § 395 of the Regulations and Procedures of the Department of State to consider charges against him "with a view to making a recommendation to the Secretary of State whether or not, under the provisions of the Department of State Appropriation Act, 1950, Section 104 Public Law 179, 81st Congress, First Session,[1] your [his] employment in the Department should be terminated in the interest of the United States." The letter [fol. 94] setting forth the notification of charges read in part as follows:

> "Under date of March 21, 1947, the President issued Executive Order 9835 prescribing procedures for the administration of an Employee Loyalty Program in the Executive Branch of the Government. Under date of March 11, 1949, the Department of State promulgated regulations and procedures, a copy of which is attached, setting forth the revised loyalty and security principles and procedures relating to employees of the Department of State.

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[1] Public Law 179, Sec. 104, provides as follows: "Sec. 104. Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States. (63 Stat. 456.)

"In the course of investigations conducted pursuant to this loyalty and security program certain information has been received by the Department of State, which, after initial consideration by the Loyalty Security Board of the Department of State, necessitates the formulation of a charge against you. . . ."

The specific charges were appellant's disloyalty to the United States and the claim that he was a security risk.

Following extensive hearings, the State Department Loyalty Board concluded that reasonable grounds did not exist for believing that appellant was disloyal to the United States and that he did not constitute a security risk to the Department of State. This was approved by the Deputy Under Secretary of State.

After the issuance of Executive Order No. 10241, amending the standard established by Executive Order No. 9835 for removal from employment on loyalty grounds, the Loyalty Security Board of the Department of State again considered appellant's case and determined that, under Executive Order No. 10241, no reasonable doubt existed as to appellant's loyalty to the United States. This decision likewise was approved by the Deputy Under Secretary of State.

Thereafter, the Loyalty Review Board of the Civil Service Commission advised appellant that it would hold a new hearing based on the charges filed by the Department of State Loyalty Security Board; and, after intermediate proceedings, the Civil Service Commission Loyalty Review [fol. 95] Board rendered its opinion, holding that there was reasonable doubt about appellant's loyalty. The action subsequently taken by Secretary Acheson appears from his affidavit filed in the District Court, as follows:

"3. On that same day I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.

"4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.

"5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before these boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review [fol. 96] Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment. . . . "

The Supreme Court, in *Peters* v. *Hobby*, 349 U. S. 331 (1955), held that the power of the Loyalty Review Board of the Civil Service Commission was limited to "persons recommended for dismissal on grounds relating to loyalty by the Loyalty Board of any department or agency." Accordingly, the District Court held that the decision of the Loyalty Review Board was a nullity in a case where (like

the present one) no such recommendation for dismissal had been made.

The appellant argues that the discharge was unlawful because the Secretary's action must be sustainable on the grounds which he invoked to support it; further, "by relying 'solely' on the invalid finding of the Loyalty Review Board and failing to make an independent determination on all the evidence and by denying appellant an opportunity to appeal to him, the Secretary violated his own regulations prescribing the manner in which he would exercise his McCarran Rider [2] authority and thereby denied appellant the procedural and substantive guarantees of these regulations." It is also argued that the Secretary "exercised his discretion under the McCarran Rider, if at all, in an arbitrary and illegal manner in that he misapprehended the legal validity of the Loyalty Review Board finding on which he relied 'solely' and in that he failed to make an independent determination of his own that appellant's discharge was necessary or advisable in the interests of the United States."

Beginning in 1947 and continuing through the time covered by appellant's dismissal, Congress had enacted [fol. 97] riders, all similar to Section 104, Public Law 179, quoted in note 1, *supra*, to the several appropriations acts covering the State Department, authorizing the Secretary of State to summarily dismiss officers and employees of that department "whenever he shall deem such termination necessary or advisable in the interests of the United States." [3]

The notice of termination of appellant's employment stated that such action was taken pursuant to the above quoted provision for summary dismissal *as well as* under Executive Order No. 9835, as amended by Executive Or-

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[2] The term "McCarran Rider" has reference to Sec. 104, Public Law 179, note 1, *supra*, and similar subsequent enactments.

[3] We recently held a similar statute to be constitutional in the case of *Scher* v. *Weeks*, Secretary of Commerce, decided January 19, 1956, — U. S. App. D. C. —, 231 F. 2d 494, cert. denied, June 4, 1956, — U. S. —.

der No. 10241. The Secretary of State, in his affidavit filed in the District Court, stated that his action was taken under Executive Order No. 9835, as amended by Executive Order No. 10241, *and also* under Section 103 of Public Law 188, 82d Congress (the same provision as Section 104 of Public Law 179, 81st Congress, note 1, *supra.*)

As well expressed by Judge Curran, of the District Court:

> "This Court cannot, of course, review the correctness of the former Secretary of State's determination. Its function is limited to determining whether any procedural requirement of the statute was violated in plaintiff's discharge.
>
> "Under Public Law 188 there was one procedural requirement, that the Secretary of State must determine in his discretion that the termination of plaintiff's employment was necessary or advisable in the interests of the United States. That determination the former Secretary of State made.
>
> "Plaintiff's contention that by virtue of the State Department's regulations he could not be dismissed under Public Law 188 unless the procedures prescribed by Executive Order 9835 were followed is [fol. 98] without merit. It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 188. This power of summary dismissal would not have been granted the Secretary of State by the Congress if the Congress was satisfied that the interests of this country were adequately protected by Executive Order 9835.
>
> "Under Public Law 188 plaintiff could have been summarily dismissed without notice of charges, hearing, or appeal."

The District Court then concluded that appellant was validly discharged under Public Law 188. Under the circumstances of this case, we must agree.

We also think that the District Court was entirely correct in directing the Civil Service Commission to expunge from its record the Loyalty Review Board's finding that

there was reasonable doubt as to appellant's loyalty to the United States as, under the *Peters* case, *supra*, the action of that Board was a nullity.[4]

The judgment of the District Court is
Affirmed.

[fols. 99-101] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

C. A. 4967-52

JOHN S. SERVICE, Appellant,

v.

JOHN FOSTER DULLES, et al., Appellees

Appeal from the United States District Court for the District of Columbia

Before: Wilbur K. Miller, Washington and Bastian, Circuit Judges

JUDGMENT—June 14, 1956

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 14, 1956.

Per Circuit Judge Bastian.

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[4] It is only fair to add that since the finding of the Review Board is a nullity, and since appellant's discharge is sustained only under Public Law 188, the following quotation from note 2 in *Scher* v. *Weeks*, supra, would seem equally applicable in this case: "It should be noted, however, that in the case at bar appellant's discharge carries no implication that he might be either disloyal or a security risk."

[fol. 102] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 103] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 407

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 13, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the procedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3101-3)